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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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JAMES F. FINDLAY, T. CLIVE DAVIES and W.  
H. BAIRD,  
Plaintiffs in Error,  
vs.  
THE UNITED STATES OF AMERICA,  
Defendant in Error.

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Transcript of Record.

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Upon Writ of Error to the United States District Court of  
the Territory of Hawaii.

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Filed

DEC 14 1914

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F. D. Monckton,  
Clerk.





**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Notice of Filing Record on Writ of Error and  
Designation of Plaintiffs in Error of Parts of  
Record to be Printed.]

*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

JAMES F. FINDLAY, T. CLIVE DAVIES and W.  
H. BAIRD,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,  
Defendant in Error.

NOTICE OF FILING RECORD ON WRIT OF  
ERROR AND APPELLANTS' DESIGNA-  
TION OF PARTS OF RECORD TO BE  
PRINTED.

To the United States of America, Defendant in  
Error Herein, and to Its Attorney, JEFF Mc-  
CARN, United States District Attorney for the  
District and Territory of Hawaii:

Please take notice that the transcript of record on  
the Writ of Error herein was filed in the above-en-  
titled court on the 4th day of November, 1914, and  
that the plaintiffs in error intend to rely on all of the  
assignments of error and exceptions in said record,  
and consider all of said record necessary for the con-  
sideration thereof with the exception of the following  
pages of said record, which plaintiffs in error do not  
consider necessary to be printed in said record and  
desire to have omitted from said record as printed:

1. Omit pp. 1a to 15, inclusive, of said record,



which pages contain orders extending the time to file said record, and insert in place thereof:

“By various orders the time of plaintiffs in error to file the transcript of record on appeal was extended to November 5th, 1914.”

2. Omit pp. 24 to 30, inclusive, being minutes of hearing.

3. Omit pp. 68 to 70, inclusive, being orders of continuance.

4. Omit pp. 71 to 72, inclusive, being minutes of hearing on motions in arrest of judgment.

5. Omit p. 78, being minutes on motion for a rehearing.

6. Omit p. 84, being minutes on allowance of bill of exceptions.

7. Omit pp. 110 to 152, inclusive, being United States Exhibits 2 to 22, inclusive, in that said exhibits elsewhere appear in full in said record.

8. Omit pp. 153 to 188, inclusive, being opinion of the Court upon the case, in that said opinion appears in full elsewhere in said record.

9. Omit also the extended title of court and cause in all cases except on the first page and in the complaint, and insert in place thereof the words “Title of Court and Cause.”

Dated: San Francisco, November 4th, 1914.

HENRY HOLMES,

W. L. STANLEY,

C. H. OLSON,

Attorneys for Plaintiffs in Error.

E. B. McCLANAHAN,

S. H. DERBY,

Of Counsel.

**Admission of Service.**

Due service of the within and foregoing Notice of Filing Record on Writ of Error and Appellants' Designation of Parts of Record to be Printed, and receipt of a copy thereof, this 13th day of November, 1914, is hereby admitted.

JEFF McCARN,

United States District Attorney for the District and Territory of Hawaii.

[Endorsed]: No. 2511. United States Circuit Court of Appeals, Ninth Circuit. James F. Findlay et al., Plaintiffs, vs. U. S. of America, Defendant. Notice of Filing Record on Writ of Error and Appellants' Designation of Parts of Record to be Printed. Filed Nov. 24, 1914. F. D. Monckton, Clerk.

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**Names and Addresses of Attorneys.**

For Appellants: HOLMES, STANLEY & OLSON,  
#846 Kaahumanu Street, Honolulu, Hawaii.

For Appellee: ROBERT W. BRECKONS, United States Attorney, Honolulu, Hawaii. [1\*]

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By various orders the time of plaintiffs in error to file the transcript of record on appeal was extended to November 5th, 1914.

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\*Page number appearing at foot of page of original certified Record.



United States of America,  
District of Hawaii,—ss.

*United States District Court for the Territory of  
Hawaii.*

THE UNITED STATES OF AMERICA,  
Plaintiff,

vs.

JAMES F. FINDLAY, T. CLIVE DAVIES and  
W. H. BAIRD,  
Defendants.

**Complaint.**

Comes now the United States of America, plaintiff, and for cause of action against James F. Findlay, T. Clive Davies and W. H. Baird, alleges as follows, to wit:

1. That heretofore and on, to wit, the 22d day of April, A. D. 1911, at Honolulu, in the Territory of Hawaii, the said James F. Findlay, T. Clive Davies and W. H. Baird, by their certain writing obligatory, commonly called an obligation, sealed with the seals of the said James F. Findlay, T. Clive Davies and W. H. Baird, acknowledged themselves to be held and firmly bound unto the United States of America in the penal sum of Fifteen Thousand Dollars (\$15,000.00), to be paid unto the said the United States of America, the said writing obligatory being subject to a certain condition thereunder written, as follows: [16]

The condition of the within and foregoing obligation is such that if the said principal J. F. Findlay shall pay to the United States of America through the Collector of Customs at the port of Honolulu in the Territory of Hawaii the amount which the Department of Commerce and Labor of the United States shall, upon such presentation of facts, determine that the said principal is liable for on account of such penalties so alleged to have been incurred, then this obligation shall be null and void, otherwise of full force and effect.

as in and by said writing obligatory and condition thereof, a copy of which is attached hereto and marked "A," will more fully appear.

2. That thereafter and on, to wit, the 4th day of December, A. D. 1911, the Department of Commerce and Labor of the United States, through the Secretary thereof, did determine that the said James F. Findlay was liable to the United States of America for and on account of certain penalties alleged to have been incurred by him as master of the British steamship "Orteric," on account of the alleged violation of a law of the United States of America designated as the Passenger Act of 1882, as amended; and did, on said 4th day of December, A. D. 1911, determine that said liability on account of said violation did amount to the sum of Seven Thousand Nine Hundred and Sixty Dollars (\$7,960.00).

3. That thereafter and on, to wit, the 20th day of December, A. D. 1911, notice of the determination of the Department of Commerce and Labor so made



as aforesaid was given to James F. Findlay, T. Clive Davies and W. H. Baird, the defendants in this case, and demand was made upon them for the payment to the United States of America of the said sum of Seven Thousand Nine Hundred and Sixty Dollars. [17]

4. That the said defendants, James F. Findlay, T. Clive Davies and W. H. Baird, notwithstanding said demand, have not, nor has either of them, paid to the United States of America the said sum of Seven Thousand Nine Hundred and Sixty Dollars (\$7,960.00), and that there is now due from said defendants, James F. Findlay, T. Clive Davies and W. H. Baird, and each of them, to the United States of America, by reason of the premises, the said sum of Seven Thousand Nine Hundred and Sixty Dollars (\$7,960.00), together with legal interest thereon from the 4th day of December, A. D. 1911.

WHEREFORE, the United States of America prays for process against the said defendants, James F. Findlay, T. Clive Davies and W. H. Baird, and that it may have judgment against the said James F. Findlay, T. Clive Davies and W. H. Baird, for the said sum of Seven Thousand Nine Hundred and Sixty Dollars (\$7,960.00), with interest thereon from the said 4th day of December, A. D. 1911, and the costs of this action.

THE UNITED STATES OF AMERICA.

By (Sgd.) ROBT. W. BRECKONS,

United States Attorney. [18]

United States of America,  
Territory of Hawaii,—ss.

Robert W. Breckons, being first duly sworn according to law, deposes and says: That he is the Attorney of the United States within and for the District and Territory of Hawaii; that he is duly authorized to bring this action; that he has read the above and foregoing Complaint by him subscribed on behalf of the United States of America, and knows the contents thereof, and that the facts therein stated are true.

(Sgd.) ROBT. W. BRECKONS.

Subscribed and sworn to before me this 7th day of March, A. D. 1912.

[Seal]

(Sgd.) F. L. DAVIS,  
Deputy Clerk, United States District Court, Territory of Hawaii. [19]

“A.”

WHEREAS the Collector of Customs of the port of Honolulu, Territory of Hawaii, has given notice of J. F. Findlay, Master of the British Steamship “Orteric,” that the said Master has incurred certain penalties on account of alleged violations of “The Passenger Act, 1882” as amended; and

WHEREAS the said Collector has been authorized by the Department of Commerce and Labor of the United States to grant immediate clearance to said Steamship upon a bond being furnished in the penal sum of Fifteen Thousand Dollars (\$15,000),



approved by the United States District Attorney for the Territory of Hawaii, to insure the payment of such penalties for such violations aforesaid as shall be determined by the Department of Commerce and Labor of the United States to have been incurred by the said Master after the presentation, within a reasonable time, by the said Master, or his agents or attorneys, and the officials of the United States at said Honolulu, of the facts, to said Department; and

WHEREAS a bond in the form of these presents and with the sureties therein named, has been approved by said United States District Attorney;

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS: That the said J. F. FINDLAY, as principal, and T. CLIVE DAVIES and W. H. BAIRD, both of said Honolulu, as sureties, are held and firmly bound unto THE UNITED STATES OF AMERICA in the penal sum of FIFTEEN THOUSAND DOLLARS (\$15,000), for the payment of which well and truly to be made, the said principal and sureties do bind themselves, their heirs, executors and administrators firmly by these presents:

THE CONDITION of the within and foregoing obligation is [20] such that if the said principal J. F. Findlay shall pay to the United States of America through the Collector of Customs at the port of Honolulu in the Territory of Hawaii the amount which the Department of Commerce and Labor of the United States shall, upon such presentation of facts, determine that the said principal is

liable for on account of such penalties so alleged to have been incurred, then this obligation shall be null and void, otherwise of full force and effect.

IN WITNESS WHEREOF the said principal and sureties have hereunto set their hands and seals this 22d day of April, 1911.

(Sgd.) JAMES F. FINDLAY. (Seal)

(Sgd.) T. CLIVE DAVIES. (Seal)

(Sgd.) W. H. BAIRD. (Seal)

In presence of

W. M. BUCHUNAN,

G. E. WHITNEY.

The foregoing bond is hereby approved as to form and sureties.

Dated, April 22, 1911.

(Sgd.) ROBT. W. BRECKONS,

United States District Attorney for the Territory of Hawaii.

[Endorsed]: No. 81. (Title of Court and Cause.) Complaint. Filed Mar. 7, 1912. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [21]

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[Title of Court and Cause.]

**Answer.**

Now comes the defendants in the above-entitled cause, by their attorneys, Holmes, Stanley & Olson, and for answer to the complaint herein filed, deny each and every allegation therein contained.

Dated, Honolulu, T. H., March 28, 1912.

(Sgd.) HOLMES, STANLEY & OLSON,

Attorneys for Defendants.



[Endorsed]: No. 81. (Title of Court and Cause.)  
Answer. Filed Mar. 28, 1912. A. E. Murphy, Clerk.  
By (Sgd.) F. L. Davis, Deputy Clerk. [22]

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[Title of Court and Cause.]

COME NOW the parties hereto, by their respective attorneys, and waive a jury trial herein, and agree and stipulate that this cause may be heard by the Court without the intervention of a jury; and further stipulate and agree that said cause may be heard by the Court without intervention of a jury on Monday, the 22d day of April, A. D. 1912.

(Sgd.) ROBT. W. BRECKONS,  
Attorney for Plaintiff.

(Sgd.) HOLMES, STANLEY & OLSON,  
Attorneys for Defendants.

[Endorsed]: No. 81. (Title of Court and Cause.)  
Stipulation. Filed Apr. 20, 1912. A. E. Murphy,  
Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [23]

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### [Decision.]

[Title of Court and Cause.]

January 20, 1913.

1. *Evidence—Parol evidence rule—Extrinsic evidence to show bond's legal object:* In a suit on a bond, though the bond may be capable of being read as contemplating an unauthorized arbitration, yet when extrinsic facts would show the intent of an authorized submission to a Government officer for remission of penalties under

Rev. Stat., sec. 5294, as amended, such facts are admissible in evidence, in order to effectuate the bond when that may be done without varying its terms.

2. *Public officers—Power and authority—Submission to arbitration:* United States officers have no authority, in the absence of statute, to submit to arbitration a controversy as to the fact of violations of law.
3. *Same—Same—Penalties—Remission proceedings—Requirement of bond from applicant:* The Secretary of Commerce and Labor has authority, under Rev. Stat., sec. 5294, as amended, to exact or accept from an applicant for remission of statutory penalties, a bond to secure payment thereof in case of the applicant's disallowance.  
[31]
4. *Estoppel—To deny public officer's authority—Penalty—Remission proceedings:* A ship's master violating the Passenger Act of 1882, 22 Stat. 186, as amended, who on his own request and for his own advantage obtains clearance of his vessel under bond for payment of "such penalties as may be determined by the Department (Secretary) of Commerce and Labor to have been incurred," on submission of the facts, and whose pursuant submission admits the violation but sets up alleged extenuating circumstances, is estopped to deny the submission to be an application for remission of penalties within the Secretary's power under Rev. Stat., sec. 5294 as amended, when, otherwise, the master and his



- ship would escape satisfaction of such penalties.
5. *Statutes—Revised Statutes—Conflict with pre-existing laws*: In interpreting the Revised Statutes, resort may not be had to original antecedent acts of Congress except in case of ambiguity of the revision.
6. *Penalties—Remission proceedings—Bond*: As above, paragraphs 1, 3, 4,

At Law: Action of debt on bond.

R. W. BRECKONS, U. S. District Attorney,  
for Plaintiff.

C. H. OLSON and I. M. STAINBACK  
(HOLMES, STANLEY & OLSON, with  
them), for the Defendants. [32]

This is an action of debt to recover \$7,960 on a bond of the defendant Findlay, master of the British steamship "Orteric," as principal, and the defendants Davies and Baird as sureties, conditioned upon the payment to the United States of America through the Collector of Customs at the port of Honolulu, of such penalties as, in the language of this instrument, should be "determined by the Department of Commerce and Labor to have been incurred by the said master" by reason of alleged violations of the Passenger Act of 1882 as amended (hereinafter referred to as the Act): 22 Stat. 186; Act of Feb. 14, 1903, sec. 10, 32 Stat. 829; Act of Feb. 9, 1905, 33 Stat. 711; Act of Dec. 19, 1908, 35 Stat. 583. By stipulation in writing the case was submitted to the Court for determination without the intervention of a jury. From the evidence the facts appear as hereinafter set forth.

On arrival of the British steamship "Orteric" at the Port of Honolulu, April 13, 1911, on a voyage from Oporto and Gibraltar, carrying passengers composed mainly of Portuguese and Spanish immigrants destined for Hawaii, an examination of the vessel was made by customs officers assigned to that duty by the collector pursuant to the provision of the Act, section 11. This inspection resulted in a report of April 17, disclosing violations of the following sections of the Act: 2, relating to berths; 3, light [33] and ventilation; 4, food; 5, hospitals; 6, discipline and cleanliness; 7, posting of notices prohibiting ship's company from visiting steerage quarters. Immediately the collector gave written notice to the master of his liability to penalties in respect to the ship "Orteric" for these violations, specifying them in detail, and also for violations of section 9 relating to passenger manifests. Moreover, this notice stated the maximum penalty in each instance, offering an opportunity "to present any statements desired," and directed attention to section 13 of the Act providing a lien upon the offending ship for these penalties. Thereafter the local agents of the "Orteric" directed to the collector a letter dated April 22, requesting him to cable to the Secretary of Commerce and Labor (hereinafter called the Secretary) for permission to grant clearance to the "Orteric" "upon a satisfactory bond being furnished for the payment of any penalties which may be imposed in respect to the alleged violations of the Passenger Act by that steamer, . . . full particulars regarding the matter to



be furnished to the Department of Commerce and Labor for their determination of what shall be done in connection therewith." On the same day the agents had already directed another letter to the collector, making "application for clearance of the said steamer for Victoria, British Columbia," and "in view of the alleged violations" offering to "furnish an adequate bond covering the same, providing that the facts concerning such alleged violations be submitted to the Secretary . . . . [34] for determination." The collector, by cable, notified the Secretary of the application for clearance "under bond covering alleged penalties" and recommended "favorable consideration," to which the acting Secretary replied by cable of April 22, "With approval United States attorney clear 'Orteric,' fifteen thousand dollar bond." The bond in suit, for this amount, was thereupon executed and by the United States attorney was "approved as to form and sureties." The bond recites, by way of introduction, the collector's notice to the master of the latter's having "incurred certain penalties on account of alleged violations" of the Act, and the department's authority to the collector to grant immediate clearance upon the furnishing of an approved bond "to insure the payment of such penalties for such violations aforesaid as shall be determined by the department . . . . to have been incurred by the said master after the presentation within a reasonable time, by the said master, or his agents or attorneys, and the officials of the United States at Honolulu, of the facts, to said department." The condition of the

bond is the payment by the master to the United States through the collector, of "the amount which the Department of Commerce and Labor of the United States shall, upon such presentation of facts, determine that the said principal is liable for on account of such penalties so alleged to have been incurred." Upon delivery of the bond to the collector, on April 23, clearance was granted forthwith.

Thereafter the Honolulu attorneys for the master sent to the collector, a letter dated April 27, in which [35] "in order to preserve the rights" of their client, they "formally enter protest against the imposition of the penalties aforesaid and all penalties whatsoever that may be imposed on account of alleged violations" of the Act, but promise to file with the collector as soon as possible "a full statement of the facts concerning the said alleged violations, to be submitted to the Department of Commerce and Labor in order that it may arrive at a proper determination of the matter."

After some extension of time granted to the master for his submission of facts, the collector, on June 14, received from the Honolulu attorneys a letter "submit(ting) for presentation to the Department of Commerce and Labor," the affidavits of the master, the chief officer, the ship's doctor, and one of the nurses of the "Orteric," and "copies of notices in the English, Portuguese and Spanish languages, which were posted according to the above mentioned affidavits as required by said section 7" of the Act, and which the master's attorneys state were "obtained" by them "on board the S. S. 'Orteric' from



the captain and chief officer thereof.” Also, this letter promised an endeavor to have the owners furnish the department with a copy of the ship’s plans and specifications referred to in the master’s affidavit, and asked permission to submit a supplementary presentation of facts concerning the alleged violations of section 3, as to ventilating apparatus, by affidavit or affidavits to be secured immediately upon the return of a Mr. Campbell who was to arrive in Honolulu on June 16, and who was expected [36] to establish inspection and approval of the ventilating apparatus at the port of clearance by emigration officers. There is no evidence before the Court, however, that any submission of the plans and specifications, or any supplementary presentation of facts as to ventilating apparatus, was ever made. A summarization of the affidavits follows.

Section 2, Berths: The master admits the violation of section 2 of the Act in that all single male passengers were, after March 5, not berthed in the fore part of the vessel in a compartment separate from the space or spaces appropriated to other passengers, but on account of a riot between the Spanish and Portuguese male passengers it was, “in order to maintain discipline and prevent bloodshed, . . . . deemed mandatory to segregate the Portuguese passengers from the Spanish passengers, and therefore the affiant removed said Portuguese male single passengers from said compartment in the fore part of the said vessel aft.”

Section 3, Light and Ventilation: The master does not attempt to show the ship’s provisions for light

and ventilation to have conformed with the requirements of the Act but deposes to his “belief that the ventilating devices in each compartment occupied by passengers . . . . were equal in capacity and utility to the ventilating specifications set forth in section 3 of the Act, . . . . as will be more particularly shown by a copy of the plans now in possession of . . . . the owners of said steamship, and the specifications [37] attached thereto, to be supplied for use in connection with this affidavit” (but, as above noted, not supplied). On the contrary, the master attempts to bring the case within the concession made by this section of the Act, that “in any steamship the ventilating apparatus provided, or any method of ventilation adopted thereon, which has been approved by the emigration officers at the port or place from which said vessel was cleared, shall be deemed a compliance with the foregoing provisions.” In this behalf, he deposes, “that on the 21st day of February, 1911, the said steamship was cleared from the port of Oporto in Portugal, . . . . ; that on the day preceding about 10 Portuguese officials, among whom affiant believes were included Portuguese emigrant officials, carefully inspected the said steamship, . . . . , with reference to construction, equipment, food supply, and ventilation, and [the said steamship] was approved in all such respects and otherwise by all of said officials.” As to water-closets the master deposes “that there were sufficient closets in number in proportion to the number of passengers according to the requirements of said section 3, . . . .



all enclosed, some of which were located on one side of the upper deck . . . . and the others on the other side of said upper deck.” Nothing is said as to the closets being “properly enclosed and located” or “kept and maintained in a serviceable and cleanly condition throughout the voyage,” within the provisions of the Act, though these were subjects of complaint by the collector, and though the point to which [38] the affidavit is especially directed, sufficiency in number of closets, is not made by the collector at all but is conceded by his letter of April 17, and therefore called for no reply or statement in behalf of the ship. Moreover, the benefit of official inspection is not extended by the above exception to the matter of closets.

The affidavit’s introductory statement should here be noted, “that on the 24th day of February, 1911, the said steamship left Gibraltar with about 1,500 Spanish and Portuguese emigrant passengers aboard whose destination was Honolulu; that about 550 of said passengers were Portuguese and the remainder Spanish; and it should be noted that nothing is said as to whether some of these passengers were taken on at Gibraltar—in which case a new and favorable inspection would be required, to bring the case within the benefit of the above exception. The above-mentioned report of the inspectors was in the hands of the Secretary for consideration in this case; it shows that 1,000 of the passengers were taken on at Gibraltar, after there had been taken on at Oporto, three days before, but 300 passengers, and at Lisbon, two days before, only 252 more. So the master,

while claiming exemption, has failed to show that he is within the proviso of section 3,—indeed, has apparently attempted to mislead the Secretary by such a suppression and perversion of facts as would imply an inspection after all, instead of about a third of, the passengers had been taken aboard. [39]

Section 4, Food: The master here also deposes by way of concession and justification, or confession and avoidance, “that while milk for infants and children was served regularly only twice a day, nevertheless mothers of such infants and children were at all times supplied upon application with condensed milk at other times, and often served at irregular times without application.”

Section 5, Hospitals: The master deposes that the hospital compartments were “ventilated by large skylights and portholes,” but does not meet the complaint that the ventilation was insufficient. He also deposes to the utilization as hospitals of two large compartments aggregating more than 1,500 square feet, but gives details showing that the access of air was not direct and was cut off in rough weather. On this point the affidavit appears to dodge the question of the suitability of the regular hospital and to attempt to divert attention therefrom to two special, make-shift hospitals.

Section 6, Discipline and Cleanliness: The master makes no denial of the alleged filthy condition of the ship, but deposes that he, the chief officer, the ship's doctor, and an interpreter, almost every day, and one or more of them every day, inspected the ship and passengers and “warned and directed the pas-



sengers to keep themselves in a cleanly condition and to stay on the upper deck as much as possible," and "directed said passengers to air their baggage and bedding whenever the weather would permit, [40] but with few exceptions the said passengers refused to do so, stating that they feared their belongings would be stolen," and he deposes that on account of the great number of passengers, the crew could not air the bedding and baggage without the passengers' assistance, and that at all times the crew "was engaged in cleaning the decks and compartments and did all in that respect that could reasonably be done." The master thus, in effect, regards the statutory duty of the ship as performed by its officers' merely directing the passengers to maintain cleanliness. The ship's condition of disorder and filth on arrival at Honolulu is attributed to excitement of the passengers in view of the approach of landing and end of the voyage,—who threw the remnants of their breakfast about the floors and decks, instead of overboard as they had customarily done theretofore, and also to the tearing of cloth from mattresses in order to make bags for their belongings, with consequent scattering of the mattress-stuffing. And it is stated, that it was at the collector's direction that the ship was left in this condition for several days after docking, a precaution, by the way, which enabled the inspectors, and the grand jury who also visited the ship, to see conditions *in statu quo*.

The master then deposes to the posting of copies of section 6 of the Act, in the Portuguese and Span-

ish languages, in all of the companionways and in various parts of the vessel; but states that in the course of the voyage many of them were torn down by passengers, and that such [41] notices were again posted about two weeks before reaching Honolulu; also that very few of the passengers could read,—as if the Act made this posting at all dependent upon the literacy of the passengers.

Section 9, Passengers Manifest: The master admits that “the shifting of the passengers in order to segregate the Spanish from the Portuguese, resulted in some confusion, making it impossible for affiant to include in the list of passengers the exact compartments and spaces occupied by them thereafter.”

The affidavit of the chief officer “confirms . . . . in all respects” the affidavit of the master, as does the affidavit of the ship’s doctor. The doctor also deposes that all compartments and decks were swept not less than twice daily, and were treated daily with a suitable disinfectant; that he would not permit the washing of apartments occupied by passengers because in his opinion and from the experience of physicians in charge of emigrant vessels, such washing results in unavoidable dampness highly detrimental to health. He deposes that “any and all accumulations . . . . were rendered physically harmless and innocuous by disinfectants,” and “the sleeping apartments were scraped with shovels every day and swept,” and “most of the litter found on board . . . . at Honolulu, was the result of food and rubbish and the contents of mattresses being



thrown or strewn about the deck by the passengers in their excitement and haste to land." He says that "the temporary or additional hospital quarters [42] . . . . were, in the opinion of the affiant, well suited to that purpose considering the circumstances," but though deposing that he "directly superintended all of the sanitation and sanitary measures," he says nothing about the regular hospital and its ventilation. "The mortality on board said vessel," he attributes "very largely to the concealment by parents of the ailments of their children and their refusal to submit them to medical treatment." "While," as he says, "milk was served regularly only twice a day, nevertheless condensed milk was served at irregular times each day to the mothers for the use of such children, both upon application and without application"; "constant inspection was made by affiant, and milk supplied in all cases where it was found necessary," and "a quantity" (stating it) of condensed milk was provided "ample for the requirements of the children and nursing mothers." The water supply for bathing and washing of said passengers was unlimited, and the usual accommodations for washing existed.

One of the nurses deposes that "she assisted throughout said voyage in caring for the passengers who were ill and for infants; that milk was served twice daily regularly . . . . and at irregular times in addition whenever desired by the mothers of infant children and also whenever it appeared necessary to the hospital staff; that affiant believes that

milk in ample quantities was served at all times." Her statements as to hospitals and ventilation is the same in substance as that of the master, whom she also confirms as to the riot and the consequent segregation of Portuguese [43] and Spanish.

The collector thereupon, on June 17, forwarded to the Secretary, the master's showing of affidavits and copies of posted notices, and the collector's own showing which consisted of the bond in suit, the above-described letters and cablegrams (by original or copy), also the inspector's report of the vessel's condition, and a letter of the collector to the United States district attorney at Honolulu dated April 17, transmitting this report and calling attention to the violations of the Act, a letter (copy) of April 18 of the Portuguese consul at Honolulu to the governor of Hawaii protesting against the sanitary conditions of the vessel, the report (copy) of the grand jury for the April, 1911, term of this court adverse to the master on the same points as covered by the above-described letter of the collector to the master. And a few merely formal and immaterial letters of acknowledgment and of transmission between the collector and other officials were included among the papers presented to the Secretary. He also had before him a letter directed to the department by the Washington attorney for the owners, dated April 22, but not received until two days later, and perhaps of no bearing on the question of the object of a bond the negotiations for which had already been consummated by other, and the leading, attorneys in the matter at Honolulu, but which in fairness to



the respondents should nevertheless be mentioned as possibly not so equivocal as the bond and the preceding Honolulu correspondence, and as more clearly capable of [44] being read as contemplating some kind of an "adjudication," i. e., arbitration, by the Secretary. Though, under all the circumstances, the conclusion is inevitable that, even if this letter did imply an arbitration, it would not express the actual object of the negotiations. This conclusion is borne out by several considerations. In the first place, the Washington attorney had no part either in the preparation of the bond, or of the submission pursuant thereto, i. e., of the matter which the bond was intended to cover and which would indicate the bond's purpose; and it may be fairly found from the evidence, direct and circumstantial, that any light of his statements would be at most no more than dimly reflected light. Even giving his use of the word "adjudication" a strict sense, certainly not called for by any controlling fact or presumption of fact or of law (but quite the contrary), he, still, was not in as good position to characterize the proceedings as were those others who were active in the actual negotiations and on the field, and whose request for clearance discloses that the object of the proposed submission of "full particulars regarding the matter," was the Secretary's "determination of *what shall be done in connection therewith*" (agents' letter of April 22, above). Furthermore, while it might be a possible, though it is by no means a necessary, nor even the probable or reasonable, inference from the Washington at-

torney's letter of April 22, that it was he who had the first advice and direction from [45] the owners of the vessel and so himself initiated the proceedings; still it is important to repeat that the Honolulu attorneys were the ones on the ground and that it was really their application for clearance, or that of the local agents under their guidance, which was acted upon, and not the application of the Washington attorney, whose letter, as suggested above, did not reach the department until two days after the vessel had cleared,—sent on a Saturday and not received until the following Monday (as shown by the department's receipt stamp on the face of the letter). Also, after the submission to the Secretary this attorney, though specially requesting by letter of July 11, further time for presentation of a "Written brief of his contentions" to be "supplement(ed) . . . . by a verbal presentation" of "the points which he desires the Department to consider," nevertheless failed to present any defense of the master or any argument in support of a defense,—indeed, did not appear at all, as he would naturally have done if the consideration of the Secretary had been *quasi*-judicial instead of executive, i. e., in the nature of judgment on disputed facts rather than of pardon for admitted acts.

This letter of April 22 recites the vessel's detention for alleged breaches of the Act, the details of which are unknown, and in view of the time required for this attorney and the Secretary to fully ascertain the facts [46] and of the urgent importance of minimizing delay (as a cargo waited at



Seattle), requests the department to instruct the collector by cable to report of cable "the cause of the detention with such details as may be necessary to enable the department to act on the owner's request, which is that permission be granted to the vessel to proceed on her voyage "upon her master or Honolulu agent entering into bond for the making good of any penalty found to be due either by the vessel or the master, and that upon the coming in of a formal report of the matter the questions involved be then adjudicated upon after a hearing."

The collector, in his letter of June 17 transmitting the papers in the case, reported penalties aggregating \$7,960 as follows: "Section 2, \$5 for each statute passenger,—1,242 at \$5,—\$6,210; section 3, penalty of \$250; section 4, misdemeanor reported to United States attorney; section 5, penalty of \$250; section 6, penalty of \$250; section 7, misdemeanor reported to United States attorney; section 9, penalty of \$100." And it will be observed that in the consideration of the case, no action was taken as to the violations of a criminal nature, alleged in the collector's letter notifying the master of his liability, namely, breaches of sections 4 and 7 of the Act, which are misdemeanors.

On December 4, 1911, the acting Secretary directed to the collector a letter in this matter, which he characterizes as "the application of James Findlay, master, for relief from the penalties incurred in the case of the steamer [47] 'Orteric' for violations of the Passenger Act," namely, sections 2, 3, 5, 6 and 9, but not sections 4 and 7 involving misde-

meanors. After reviewing at length the report of the grand jury, the acting Secretary concludes:

“From the papers submitted, it is evident that this vessel with 1,242 statute passengers was navigated on a voyage of eight weeks under all conditions of weather in violation of practically all of the provisions of the passenger Act having to do with the health, comfort, and well-being of the passengers. The death of 57 children during the voyage marks this as the worst case ever submitted to the Department. The sexes were not properly segregated during a large portion of the voyage, the master stating that the confusion was such that it was impossible for him to state in the manifest the exact compartments and spaces occupied by the various passengers. The ventilation of the ship appears to have been wholly inadequate, this lack of ventilation in the opinion of the grand jury, increasing the rate of mortality. Ill-ventilated hospital facilities without adequate equipment were furnished; the manifest of the vessel was not completed, and the sanitary conditions of the vessel were inexcusable. The Department concurs in the following extract from the report of the Grand Jury:

“ ‘We cannot emphasize too strongly the necessity for the observance of the regulations requiring vessels to be kept in a clean and sanitary condition. When poor immigrants, perhaps unaccustomed to modern methods of sanitation, are brought into a tropical climate such



as Hawaii, not only their own good, but the good of the community in general is subserved by a rigid insistence on compliance with the law.'

"In the opinion of the Department, penalties aggregating \$7,960 were incurred in this case for violation of the sections enumerated and it declines to intervene in behalf of the offenders."

Due notice of this determination was given to the principal and sureties and demand made for payment of \$7,960 covering the above penalties, but such payment the obligors have refused and neglected to make. [48]

When the action came on for hearing, the evidence first submitted consisted merely of the execution and delivery of the bond, the determination of the acting Secretary, notice thereof to the obligors and demand for payment, and the breach of the bond's condition,—all on the theory that the undertaking was in any event valid as a common-law obligation. After study of the cases as thus submitted, I came to the conclusion that the bond could not be sustained on its face, so far as concerned the possibly apparent (but not necessarily exclusive) nature of the condition as one for the payment of such sum as the department or its chief officer, should determine on an arbitration; in other words, the bond on its face seemed capable of the implication; and this the first apparent or natural implication, of such action by the Secretary as would amount to the exercise of judicial functions; i. e., an arbitration between the United States and the master of the

“Orteric,” in which, also, the arbitrator was an executive officer not only of the Government but of the department particularly interested. Accordingly, at the Court’s suggestion, the Government moved to re-open the case for the introduction of further evidence, to show the exact nature of the whole transaction between the representatives of the vessel and the officers of the Government. Also, in the consideration of the evidence, a suspicion arose, from the opening statement of the acting Secretary’s letter of December 4, characterizing the proceedings as an “application for relief from penalties incurred,” as well as from his concluding statement of “declin(ing) to intervene in behalf of the offenders,” that the bond contemplated [49] not an arbitration of any controversy, not a *quasi*-judicial determination of disputed liability for penalties, but a proceeding for remission of penalties, or at least for relief from the legal effect of admitted acts, done, however, under alleged extenuating circumstances.

In fairness, it should be said, here, that any conclusions of this opinion, as to the character of the proceedings, are based entirely on what was done therein by the master and his witnesses and attorneys, their “practical construction,” and not in the least on the acting Secretary’s characterization of the proceedings in his letter of December 4,—which characterization is, for our purposes, assumed to be mere irrelevant opinion, or hearsay; though without committing myself to an opinion either way, it is possible that something could be said in support of its evidential value. No contention is made on be-



half of the obligors that the collector ever regarded the proceedings as anything but a submission for mitigation; and any such contention would be contrary to the express language of his letter of June 17, transmitting to the department the showing in behalf of the respective parties.

The motion to re-open was granted, and over the objection of defendants' counsel on the ground of violation of the parol evidence rule, the facts other than those proved at the first hearing were disclosed as above set forth. This extended review of the whole transaction has seemed necessary in fairness to all parties, and also advisable in order to [50] make the reasons for my conclusions fully understood.

This course of hearing further evidence was taken deliberately, and seemed an enlightened application of the parol evidence rule, within the rational limits marked by Mr. Wigmore. See 4 Wigmore on Evidence, sec. 2462, pp. 3476, 3477; sec. 2463, p. 3488; sec. 2465, pp. 3490, 3492; sec. 2470, p. 3499; 5 *Id.*, sec. 2462, note 8. In the language of Mr. Wigmore's Pocket Code of Evidence, "The ultimate standard of interpretation is the sense employed by the party or parties doing the legal act," sec. 1958, rule 222, and in resorting to the "species of usage" which may be employed "in ascertaining this ultimate standard," the Court may adopt even "a sense variant from that of general usage," upon being "persuaded (1) that such sense exists in some special or personal species of usage, and (2) that the party was employing that other species of usage," secs. 1959, 1960;

and “the sense supplied by general usage, and provisionally adopted,”—(“as a means of attaining (not of supplanting or of competing against) the ultimate standard, namely, *the sense actually used by the party or parties to the act,*”)—“must be rejected, as soon as it is made to appear that there exists some other sense in a special or personal usage which was followed by the party or parties in the particular case,” sec. 1961, with sec. 1960 interpolated. Indeed, Mr. Wigmore in his edition of Greenleaf on Evidence, uses the language of Professor Thayer to suggest as “natural” a “free and full range among extrinsic facts in aid” of “the process of interpretation.” 1 Greenleaf on Evidence, 16th ed., [51] sec. 305j; and see *Id.*, sec. 305k. By this test, it appears to my satisfaction that the parties did not intend a submission in the sense in which the words of the bond might naturally be first taken, i. e., a submission of facts with the object of a determination of the master’s guilt or innocence of the law’s violation,—an arbitration, but that the parties had in view a submission of facts with the object of a remission of the penalties to which the actual violation of the law had made the master confessedly liable. And not only do the facts, admitted over counsel’s objection, support this reading of the bond, but also the presumption of right-acting (the most universal presumption of life) leads me to disregard the superficial or first apparent sense of the bond’s language. For, to posit an arbitration is to read the bond as contemplating an unauthorized act. *Hobbs v. McLean*, 117 U. S. 567, 575, 576;



Delaware &c. R. Co. v. Kutter, 147 Fed. 51, 62; United States Fidelity &c. Co. v. Board of Com'rs, 145 Id. 144, 148, 149; 17 A. & E. Enc. L., 2d ed., 17, 18. And see *Cooke v. Graham's Admr.*, 3 Cranch, 229, 235, in which Chief Justice Marshall declares that in "many cases on the construction of bonds . . . . the letter (even) of the condition has been departed from, to carry into effect the intention of the parties."

As a general rule, in the absence of an enabling statute, public officers are without authority to submit to arbitration a controversy, in which the Government is a party. [52]. In support of this proposition, a mere reference must suffice to the following authorities as in point or suggestive: *Jones v. Howard*, 4 Mich. 446, 448, 449, for the general principle that "officers who are created by statute must confine their acts within its provisions"; *Mechem on Public Offices and Officers*, sec. 511, and n. 5, secs. 505-507; the valuable decision of Circuit Judge Woodbury in *United States v. Ames*, 1 Woodb. & M. 76, 24 Fed. Cas. 784, 789, 790, No. 14,441, applying this principle to an arbitration submission; *Morse on Arbitration*, 30; *Child v. United States*, 4 Ct. Cl. 176, 184; *District of Columbia v. Bailey*, 171 U. S. 161, 176, in which Mr. Justice White, though viewing liberally the contractual capacity of certain officers as implied from other recognized powers, yet holds that the "mere absence of a statutory inhibition" is in general no justification for the exercise of the power of submission, but that the officer must first have his authority from that legislative body

(municipal, state or national), which is his guardian if not his parent; *Benjamin v. United States*, 29 Ct. Cl. 417, 419; *Child v. United States*, *supra*. See *Brannen v. United States*, 20 Ct. Cl. 219, 224. (It is worth while to note in passing that the value of the Court of Claims reports as a source of authority on many phases of the powers of public officers, has apparently been overlooked [53] by the Courts and law-book writers.) And the reasoning of the decisions on the power of public officers to compromise would seem to add some support to the principle, applied in the above-cited cases to the power to arbitrate,—regardless of distinctions between compromise and arbitration. See, e. g., the opinion of Judge Benedict in *United States v. George*, 6 Blatchf. 406, 25 Fed. Cas. 1277, 1279, 1280, No. 15,198.

It may be observed by the way that the violations of statute out of which the mooted transaction arose, though close to the border-line of the *quasi*-criminal, are nevertheless the subject of a civil action for recovery of the penalties incurred (*Jacob v. United States*, 1 Brock. 520, 13 Fed. Cas. 267, No. 7157; *Stearns v. United States*, 2 Paine, 305, 22 Fed. Cas. 1188, No. 13,341; *Boyd v. Clark*, 13 Fed. 909; 16 Enc. Pl. & Pr. 231–239), especially if the parties so choose to regard them (see *Moller v. United States*, 57 Fed. 490, 495); so that the bond would not be held invalid on the score of a prohibited arbitration of a subject of criminal prosecution (2 A. & E. Enc. L., 2d ed., 557, 558; 3 Cyc. 595; 5 Enc. L. & P. 38).

Also, it should be noted that, assuming an arbi-



tration for purpose of discussion, the fact of the arbitrator's being practically one of the very parties, or at least the agent of a party, does not in any way control my view of the bond on its face; for the principal under the bond has waived any objection of disqualification for interest, because he has, of course, entered into the obligation with full [54] knowledge of the arbitrator's being an agent of the Government. 2 A. & E. Enc. L., 2d ed., 637; 3 Cyc. 619; 5 Enc. L. & P. 88. See 3 Cyc. 617, n. 48.

Furthermore, even if there were plausibility in the argument made in behalf of the obligors, that the giving of a bond was enforced by circumstances (the urgent importance of getting the ship away for its waiting cargo, etc.), i. e., the claim of duress, involuntariness, such argument is quite untenable under the facts of the case, for it was the obligors themselves who proposed and urged this very procedure, and for their own convenience.

But we now come to the points which are more seriously regarded as vital. The district attorney insists that, in any event the bond, even if the contemplated arbitration and not penalty remission, is good on its face as a common-law obligation, and maintains that the granting of clearance of the vessel, at the request of the master, constitutes a good consideration to support this obligation. This argument cannot be permitted to stand in the face of the rule that public officers are without authority to submit to arbitration. It is illogical, futile, to lay down such a rule of restraint, and then hold that, in spite of any want of power, an unauthorized act may be

given effect by the officer's exaction or acceptance of a bond covering that act. This appearing to be a sound, indeed the only possible, application of the rule, the mere fact of there being a just [55] consideration, in the grant of the requested clearance, cannot be urged to the rule's undoing. An extreme illustration may make this more clear; if the fact of a *quid pro quo* in the grant of clearance may justify an unauthorized submission to arbitration in these "civil" infractions of the Passenger Act, it would equally well justify a submission to arbitration of alleged criminal breaches of this statute punishable by imprisonment, e. g., under section 4. And, of course, the argument is not sound, according to one of the most elementary principles of the law of contracts. Anson's English Law of Contracts, 2d Amer. ed., by Huffcut, 12, sec. 10, subd. 5; Harriman on Contracts, 2d ed., sec. 228. The argument overlooks the distinction between subject matter (or object) and consideration: validity of the latter cannot cure illegality of the former. See 1 Page on Contracts, sec. 325.

Moreover, the argument ignores the fundamental policy of the law relating to the powers of public officers. Counsel seems to lose sight of the broad principle of policy in his zeal to see justice done in this particular case. Indeed, there is a conflict of policies here,—the policy of securing in this particular case punishment of the offending ship and master, and the policy in general of not countenancing an abuse of power by a public officer even in a good cause. The former is a matter of insignificance



compared with the latter. Mayor Gaynor, late Justice of the Supreme Court of New York, has emphasized this distinction in a letter worthy of quoting [56] here. In reply to a zealous guardian of public morals, who besought him to "stop" certain moving-picture exhibitions of prize-fighting, he writes:

"Will you be so good as to remember that ours is a Government of laws and not of men? . . . . I am not able to do as I like as mayor. I must take the law just as it is, and . . . . shall not take the law into my own hands. You say you are glad to see that the mayors of many cities have 'ordered' that these pictures shall not be exhibited.

Who set them up as autocrats? If there be some valid law giving any mayor such power, then he can exercise it; otherwise not. The growing exercise of arbitrary power in this country by those put in office would be far more dangerous, and is far more to be dreaded, than certain other vices that we all wish to minimize or be rid of. People little know what they are doing when they try to encourage officials to resort to arbitrary power." Mayor Gaynor's Letters, *American Magazine*, January, 1913, 49. See Sir Courteney Ilbert's "Legislative Methods and Forms," pp. 38-40; A. Lawrence Lowell's "Governments and Parties in Continental Europe," p. 44; Jeremiah Black, *Essays, etc.*, p. 598.

As to the suggestion of an estoppel against the obligors to deny a power in the collector or his su-

perior officer to submit to arbitration (i. e., viewing the bond according to an intention possibly apparent on its face, of an arbitration), it must be remembered that, “estoppel of whatever kind is subject to one general rule, that it cannot override the law of the land: for example, a corporation [57] cannot be estopped as to acts which are *ultra vires*.” 9 Enc. Britt, 11th ed., 801, tit. “Estoppel.” And see the pregnant language of *Collins v. Benbury*, 3 Ired. L. (No. Car.), 285, 38 Am. Dec. 722, 726, to the effect that what is merely void cannot estop. It would be of doubtful wisdom as a precedent, though it might be fair enough to the obligors in this particular case, to hold that parties by estoppel can create a power not possessed by a public officer, to submit to arbitration.

The finding has already been intimated, of a submission for the purpose of obtaining remission of the penalties alleged by the collector to have been incurred by the ship and master. While the submission was somewhat informal,—lacking even a regular petition with prayer for relief, yet I feel satisfied, beyond any doubt, of the truth of the conclusion of fact that the proceeding was intended with a view to obtaining the exercise of leniency. Such is the only reasonable, satisfactory, answer to the questions: If the master’s showing of facts was not a submission for the purpose of obtaining remission of the alleged penalties, why did he set up extenuating circumstances? If it was an arbitration of disputed facts, which was contemplated, why did the master not show facts in defense, instead of facts in mitigation?



Here is a real estoppel. If the master has, as I find, actually regarded the proceeding covered by the bond, as a submission for remission of penalties, or led the Government's officers from the beginning to so understand [58] his intent, then why seek a principle of law to support a contrary intent? Furthermore, it is undeniable that the master and his attorneys were endeavoring to avoid liability by reason of alleged extenuating circumstances; and so, in any event, even though it be possible that such circumstances might, as the defendants claim, be adapted to a defense under an arbitration,—though it does not appear that it was ever urged *as a defense*, the department was justified in treating the submission as it did, i. e., as a submission within the authority of the Secretary to consider and pass upon under section 5294 of the Revised Statutes as amended. Any estoppel in the case lies here; and the fact that the Government permitted the vessel to clear and go beyond the reach of its courts and of the local grand jury, supplies the element of “prejudice” or “injury” which would follow denial of such estoppel. 11 A. & E. Enc. L., 2d ed., 436–438; 16 Cyc. 744. In passing, the grand jury's statement may be noted, that an indictment would have been found but for “the action of the owners of the vessel in *frankly submitting the facts* to the Department of Commerce and Labor for its determination and agreeing to abide by whatever decision that department might make.”

The objections, made in this court, in behalf of the defendants, to the evidence submitted to the Sec-

retary by the collector, as being hearsay and immaterial, are, it would seem, untenable. According to my theory of the case, it was proper to see just what was before the Secretary, [59] just what was submitted to him by the parties, so that from the matter submitted a finding might be made as to the character of the submission. See authorities on evidence, *supra*; also Wigmore's Code, secs. 1969, 1972; *Merriam v. United States*, 107 U. S. 437, 441; *Rock Island Railway v. Rio Grande Railroad*, 143 U. S. 596, 609. Objections might technically be well taken not only to the inspectors' report, the grand jury report, the official letters, etc., submitted by the collector, but also to the affidavits, the copies of posted notices and the attorneys' letter verifying the source and contents of these notices and the fact of their posting, submitted by the master. But it would be an unwarranted refinement of technicality to give heed now to the complaints of the master who had himself initiated the proceedings and throughout had made no objection but had countenanced their informality. See *Duvall v. Sulzner*, 155 Fed. 910, syll. 2, 917, 918. If I were called upon in this suit to pass upon the soundness of the Secretary's admission of evidence precedent to his ruling on the submission for leniency, I would still hold that the admission of everything submitted by the collector was harmless error, and that the master stood "convicted out of his own mouth" in the affidavit which he himself swore to and presented to the department. [60]

But on this aspect of the case, counsel for the defendants argue that the power of the Secretary to



remit is wanting, quite as much as the power of the collector or the Secretary to submit to arbitration; and the earnest contention is that the provision of the Revised Statutes, sec. 5294, as amended, upon which is founded the Secretary's power to remit, does not apply to any other subject than those within the purview of the power of remission given by the original act of Congress, 16 Stat. 458, embodied in this section of the Revised Statutes, to wit, "any fine or penalty provided for in this act," etc. Now, this original act, of February 28, 1871 (of which section 5294 of the Revised Statutes represents section 64), entitled "An act to provide for the better security of life on board of vessels propelled in whole or in part by steam, and for other purposes, 'excepted from its provisions' vessels of other countries," Revised Statutes, sec. 4400, Act of 1871, sec. 41, 16 Stat. 440. And so, if we must be guided not by what the present statute, Revised Statutes, sec. 5294, says on its face, but by what the original statute says, then it is conceded that the power to remit does not apply to the "Orteric," which is "a vessel of another country." But the argument overlooks the provisions of sections 5595 and 5596 of the Revised Statutes, which declare that these Revised Statutes "embrace the statutes . . . . in force on the 1st day of December, 1873, *as revised*," and that "all acts of Congress passed [61] prior" to said dated, "any portion of which is embraced in any section of said revision are hereby repealed, and the section applicable thereto shall be in force in lieu thereof." See *United States v. Tucker*, 122 Fed.

518, 523. Accordingly, in *United States v. Bowen*, 100 U. S. 508, 513, the federal Supreme Court held “that the Revised Statutes must be treated as a legislative declaration of what the statute was on the 1st of December, 1873, and that when the meaning was plain the courts could not look to the original statutes to see if Congress had erred in the revision,” —which “could only be done when it was necessary to construe doubtful language.” *Viethor v. Arthur*, 104 U. S. 498, 499; *Arthur v. Dodge*, 101 Id. 34, 36; *Deffebach v. Hawke*, 115 Id. 392, 402, in which Mr. Justice Field holds that “no reference can be had to the original statutes to control the construction of any section of the Revised Statutes, (even) although in the original statutes it may have had a larger or more limited application.” *Cambria Iron Co. v. Ashburn*, 118 Id. 54, 57; *Hamilton v. Rathbone*, 175 Id. 415, 419, 420; *The Brothers*, 10 Ben. 400: 4 Fed. Cas. 318, No. 1,968; *United States v. Sixty-five Vases*, 18 Fed. 508, 510. The suggestion of Judge Blatchford to the contrary in *The L. W. Eaton*, 9 Ben. 289, 15 Fed. Cas. 1119, 1123, col. 2, No. 8,612, has thus been overruled. See, also, 1 Lewis’ *Sutherland on Statutory Construction*, 2d ed., sec. 271, 2 Id., sec. 450. It is sometimes quite a violent presumption that everyone “knows the law”; and to insist that where the law has been revised the average man shall know not only the law as embodied in [62] the revision but also as contained in all the precedent statutes, would be to make law revision a burden instead of a help to an already law-enfettered public. Chancellor Zabriskie some years before had ex-



pressed the germ of this truth when he said in Key-port Steamboat Co. v. Farmers' Transportation Co., 15 N. J. Eq. 13, 24. "The only just rule of construction, especially among a free people, is the meaning of the law as expressed to those to whom it is prescribed, and who are to be governed by it." See, also, *In re Suekichi Tsuji*, 4 U. S. Dist. Ct. Haw. ——. In the statute here in question the language is not doubtful; and, so, we may not look elsewhere, but must read the provision as applying to the remission of penalties under laws relating to vessels, irrespective of the nationality of the vessel concerned. It may be noted that section 5294, as amended, is even broader than originally, now applying to penalties relating to "vessels" instead of "steam-vessels." 28 Stat. 595; 29 Id. 39.

Finally, counsel for the defendants would at all events save their case by the contention, that "even if the Secretary could remit a fine, that would not give him or the collector of customs the power to impose a fine." They say, "no penalty can be imposed upon the master until there has been a judicial determination of his liability," and in spite of the bond, the parties are left just where they started. But, we need not take the time to determine whether the collector or the Secretary has the power to [63] "impose" a penalty. See 17 Ops. Atty. Gen. 282, 283, 284; 24 Id. 583, 588. Here, we have an admission by the master of the alleged violations of statute: See summary of his affidavit submitted, and discussion thereof, *supra*; and where a party admits his wrong, as he necessarily must in making an ap-

plication for remission of penalty (The Princess of Orange, 19 Fed. Cas. 1336, 1339, 1340, No. 11,431; United States v. Morris, 10 Wheat. 246, 295), I can see no reason nor justice in giving him this extra "bite at the cherry" so that he may have two chances to clear himself instead of the one chance of the usual fair trial by his peers. A reasonable and just view seems to me to be this: Where the Secretary has the power to remit, he may in order to prevent the wrongdoer's playing fast and loose with him, exact a bond as an assurance of good faith and to secure, in case of denial of remission, full satisfaction of the penalty incurred by him and from which he asks to be relieved. This view finds support in the following cases, among many: United States v. Garlinghouse, 25 Fed. Cas. 1258, 1260, No. 15,189; Neilson v. Lagow, 12 How. 97, 107, 108; United States v. Hodson, 10 Wall. 395, 405-408, 409; United States v. Mora, 97 U. S. 413, 419-421, 422; Rogers v. United States, 32 Fed. 890; Great Falls Mfg. Co. v. United States, 18 Ct. Cl. 160, 195. If the case were one of appeal from an admitted judgment of a lower court, but the statute made no provision for an appeal bond, there would not, I think, be the slightest hesitation by any court to hold that it had power to make a rule requiring [64] the appellant to give a bond to secure performance in case of an affirmance of the judgment from which he sought relief. The case here is no different: the power to accept or require such an undertaking is an administrative power fairly and reasonably incident to the power to remit, or refuse to remit, upon



consideration of facts presented as the basis for desired remission.

The contention that “no penalty can be imposed” without “a judicial determination of liability” is contrary to the opinion of highest authority, judicial and executive, holding that the powers of the Secretary with reference to remission of penalties may be exercised either before or after judgment. *The Laura*, 114 U. S. 411, 416; *United States v. Morris*, 10 Wheat. 246, 295, 296; *Peacock v. United States*, 125 Fed. 583, 588; 17 Ops. Atty. Gen. 282, 283, 284. See 24 Ops. Atty. Gen. 583, 588.

Wherefore, I find for the plaintiff. Let judgment be entered accordingly.

(Sgd.) CHAS. F. CLEMONS,  
Judge, United States District Court.

[Endorsed]: No. 81. (Title of Court and Cause.)  
Decision of Clemons, J. Filed Monday, Jan. 20,  
1913. A. E. Murphy, Clerk. By (Sgd.) F. L.  
Davis, Deputy Clerk. [65]

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[Title of Court and Cause.]

**Motion in Arrest of Judgment.**

Come now the defendants in the above-entitled cause and move that judgment be arrested on the grounds that the declaration herein does not state facts sufficient to constitute a cause of action.

Dated, Honolulu, Feb. 5, 1913.

JAMES F. FINDLAY,  
T. CLIVE DAVIES and  
W. H. BAIRD.

By HOLMES, STANLEY & OLSON.

Their Attorneys.

To R. W. Breckons, Attorney for Above-named  
Plaintiff:

TAKE NOTICE that the foregoing Motion will be presented for hearing and determination before the Honorable C. F. Clemons, Second Judge of the United States District Court for the Territory of Hawaii, at his courtroom in Honolulu, on Monday, the 10th day of February, 1913, at 10 o'clock A. M., or as soon thereafter as counsel may be heard.

HOLMES, STANLEY & OLSON,

Attorneys for Defendants. [66]

[Endorsed]: No. 81. (Title of Court and Cause.)  
Motion in Arrest of Judgment. Filed Feb. 5, 1913.  
A. E. Murphy, Clerk. By (Sgd.) Wm. L. Rosa,  
Deputy Clerk. [67]

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[**Memorandum Opinion on Motion in Arrest of  
Judgment.**]

[Title of Court and Cause.]

May 13, 1913.

*Suretyship—Construction of bond—Surety's liability:* Though the liability of a surety be a matter *strictissimi juris*, yet his undertaking is to be construed by the same rules as other contracts



and gauged by the fair scope of it on terms,—and, if possible, so as to be upheld.

Debt on bond: Motion in arrest of judgment.

R. W. BRECKONS, United States District Attorney, for Plaintiff.

I. M. STAINBACK, of HOLMES, STANLEY & OLSON, for Defendants. [73]

The defendants move in arrest of judgment, “on the ground that the declaration does not state facts sufficient to constitute a cause of action.”

In this behalf it is contended that the word “alleged” in the condition of the bond, contemplating a determination of “penalties so alleged to have been incurred,” implies *disputed* liabilities and, so, can refer only to an arbitration, which the Department has no authority to make.

This point is disposed of at length in the decision in question.

Also, it is contended, that, from the standpoint of the sureties, as to whose contract the rule of strict construction applies, there can be no liability under this bond; counsel citing *Miller v. Stewart*, 9 Wheat. 680; *Legget v. Humphrey*, 21 How. 66, and *Long v. Pike*, 27 Ohio St. 498.

These authorities support the rule that “the contract of a surety is to be construed strictly, and is not to be extended beyond the fair scope of its terms,” and that “a surety may stand on the terms of his undertaking.” My decision had in full view the “fair scope” of the bond’s terms, and applied the distinction, overlooked by counsel, between the rule of the surety’s strict liability on the one hand and

rules of construction on the other. This difference is so well expressed by a leading American work on suretyship, that scarcely more than a mere reference need be made [74] thereto: 1 Brandt, Suretyship, 3d ed., sec. 107. The contract of the sureties here is “to be construed by the same rules as other contracts are.” The rules of evidence and the rule of estoppel and the other rules applied in my decision against these sureties, have full force,—and not the least, the rule that in construing an agreement, such a meaning will be applied to its language as to uphold it if possible. See *Id.*, sec. 103, and notes. Also, Stearns, Suretyship, secs. 18, 19.

The motion in arrest is denied.

(Sgd.) CHAS. F. CLEMONS,  
Judge, United States District Court.

[Endorsed]: No. 81. (Title of Court and Cause.)  
Memorandum Opinion of Clemons, J. Filed Monday, Dec. 22, 1913. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [75]

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[Title of Court and Cause.]

**Motion for Rehearing.**

Come now the defendants herein and move this Honorable Court for a rehearing of the above-entitled cause on the following grounds, to wit:

1st. That the decision is contrary to the law and to the evidence and to the weight of the evidence;

2d. That the Court erred in finding that the defendants applied for the remission of an admitted penalty;



3d. That the Court erred in finding that the contract of the defendants was not a contract to submit the question of liability to the determination of the Department of Commerce and Labor;

4th. That the Court erred in admitting evidence offered by the plaintiff, to which exceptions were duly taken, as appears by the transcript of evidence herein;

5th. That the Court erred in admitting certain letters and documents alleged to have been transmitted to the Secretary of Commerce and Labor by the Collector of Customs for the Port [76] of Honolulu, to which exceptions were duly taken.

JAMES F. FINDLAY,

T. CLIVE DAVIES,

W. H. BAIRD,

By HOLMES, STANLEY & OLSON,

Their Attorneys.

May 13, 1913.

To R. W. Breckons, Attorney for Above-named Plaintiff:

Take notice that the foregoing motion will be presented for hearing and determination before the Honorable C. F. Clemons, Second Judge of the United States District Court for the Territory of Hawaii, at his courtroom in Honolulu, on \_\_\_\_\_ the \_\_\_\_ day of February, 1913, at \_\_\_\_ o'clock \_\_\_\_ M., or as soon thereafter as counsel may be heard.

\_\_\_\_\_,  
Attorneys for Defendants.

[Endorsed]: No. 81. (Title of Court and Cause.)  
Motion for Rehearing. Filed May 13, 1913. A. E.  
Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy  
Clerk. [77]

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[Title of Court and Cause.]

**Judgment.**

This cause was heard before the Honorable CHARLES F. CLEMONS, one of the Judges of the United States District Court for the Territory of Hawaii, without the intervention of a jury, a jury having been waived by stipulation in writing signed by plaintiff and defendants; and the Court, having heard the evidence and argument of counsel, finds the issues joined in favor of the plaintiff, and that the defendants, James F. Findlay, T. Clive Davies and W. H. Baird, are and each of them is justly indebted to plaintiff, The United States of America, principal and interest to the present date in the sum of Eight Thousand Nine Hundred and Sixty-two and 30/00 Dollars.

IT IS THEREFORE ADJUDGED by the Court that the United States of America recover of James F. Findlay, T. Clive Davies and W. H. Baird the said sum of \$8,962.30, together with all the costs of this cause, for both of which execution will issue.

To which act of the Court in finding the issue in favor of the plaintiff, and rendering judgment



against the defendants, the said defendants and each of them except.

(Sgd.) CHAS. F. CLEMONS,  
Judge.

Approved as to form.

(Sgd.) HOLMES, STANLEY & OLSON,  
Attorneys for Defendants. [79]

[Endorsed]: No. 81. (Title of Court and Cause.)  
Judgment. Entered in J. D. Book, #2, at folio 421.  
Filed June 17, 1913. A. E. Murphy, Clerk. By  
(Sgd.) F. L. Davis, Deputy Clerk. [80]

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[Title of Court and Cause.]

**Exception to Judgment.**

Now come the defendants in the above-entitled cause, by their attorneys, Holmes, Stanley & Olson, and except to the decision filed herein on the 17th day of June, 1913, on the ground that it is contrary to the law and the evidence and the weight of the evidence.

Dated, Honolulu, June 23, 1913.

JAMES F. FINDLAY,  
T. CLIVE DAVIES and  
W. H. BAIRD,

Said Defendants.

By (Sgd.) HOLMES, STANLEY & OLSON,  
Their Attorneys.

[Endorsed]: No. 81. (Title of Court and Cause.)  
Exception to Judgment. Filed Jun. 23, 1913. A.  
E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy  
Clerk. [81]

[Title of Court and Cause.]

**Petition for Writ of Error.**

In Error from the United States Circuit Court of Appeals for the Ninth Circuit to the United States District Court for the Territory of Hawaii.

The petition of James F. Findlay, T. Clive Davies and W. H. Baird, the plaintiffs in error in the above-entitled cause, respectfully shows that in the record and proceedings in a certain cause lately pending in the District Court of the United States for the Territory of Hawaii, wherein the above-named James F. Findlay, T. Clive Davies and W. H. Baird were defendants and the United States of America was plaintiff, and in the rendition of the final judgment against your petitioners on the 17th day of June, 1913, manifest errors have happened to the great damage of your petitioner, which said errors are specifically set forth in the assignment of errors filed with this petition, to which reference is hereby made;

WHEREFORE your petitioners respectfully pray that a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to the District Court of the United States for the Territory of Hawaii, be allowed in the above-entitled cause, directing that a transcript of the record, proceedings and papers in said cause be sent to the said United [82] States *Circuit of Appeals*, duly authenticated, for the correction of the errors so com-



plained of, and that a citation issue; and your petitioners will ever pray.

(Sgd.) HENRY HOLMES,

(Sgd.) WILLIAM L. STANLEY,

(Sgd.) CLARENCE H. OLSON,

(Sgd.) INGRAM M. STAINBACK,

Attorneys for said James F. Findlay, T. Clive Davies, and W. H. Baird.

### **Order Allowing Writ of Error.**

The foregoing petition is granted and the writ of error allowed as prayed for.

(Sgd.) CHAS. F. CLEMONS,

Judge of the District Court of the United States for the Territory of Hawaii.

[Endorsed]: No. 81. (Title of Court and Cause.)  
Petition for Writ of Error. Filed Dec. 16, 1913. A.  
E. Murphy, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk. [83]

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[Title of Court and Cause.]

### **Assignment of Errors.**

Error to the United States District Court in and for the Territory of Hawaii.

Come now James F. Findlay, T. Clive Davies and W. H. Baird, plaintiffs in error, by Holmes, Stanley and Olson, their attorneys, and say that in the record and proceedings of the District Court of the United States in and for the District and Territory of Hawaii in the above cause, and in the rendition of judgment therein, manifest error has intervened to the prejudice of said plaintiffs in error in the fol-

lowing, among other things, to wit:

I.

Said District Court of the United States in and for the District and Territory of Hawaii in the trial of said cause erred in admitting in evidence over the objection and exception of the plaintiffs in error Exhibit 7, the same being a letter dated Honolulu, April 22d, 1911, addressed to E. R. Stackable, and signed "Theo. H. Davies & Co., Ltd.," requesting the Collector of Customs to cable to the Secretary of Commerce and Labor, Washington, for permission to grant clearance to the "Orteric" upon a satisfactory bond being furnished for the payment of any penalties which may be imposed for the alleged violations of the [85] Passenger Act by that steamer.

II.

Said Court erred in admitting in evidence over the objection and exception of the plaintiffs in error Exhibit 8, the same being a letter dated April 22d, 1911, addressed to E. R. Stackable, Collector of Customs, Honolulu, and signed by "Theo. H. Davies & Co., Ltd.," making application for clearance of the S. S. "Orteric" and offering to furnish a bond covering the alleged violations of the Passenger Act provided the facts concerning such alleged violations be submitted to the Secretary of Commerce and Labor for determination.

III.

Said Court erred in admitting in evidence over the objection and exception of the plaintiffs in error a letter dated Honolulu, June 17th, 1911, and ad-



dressed to the Secretary of Commerce and Labor, Bureau of Navigation, Washington, D. C., and signed by "E. R. Stackable, Collector," which said letter refers to a cablegram of April 22d, 1911, addressed to the Secretary by the Collector, and transmits a copy of the correspondence between Captain Findlay, the Customs Office and the United States District Attorney relative to the alleged violations of the Passenger Act of 1882, and enumerates penalties incurred under Sections 2, 3, 4, 5, 6 and 9 of said Act amounting to \$7,960.00 and suggests that the fine be mitigated to \$2,000.00, which said letter was admitted in evidence as Plaintiff's Exhibit 9.

#### IV.

Said Court erred in admitting in evidence a letter dated Honolulu, April 18th, 1911, addressed to R. W. Breckons, United States District Attorney, and signed by "E. R. Stackable, [86] Collector of Customs," enclosing a copy of the report of the Deputy Collector and Inspectors who measured and examined the "Orteric," and stating that, as appears from the report, 1,552 emigrants were taken on board the "Orteric"; that there were 14 births and 58 deaths during the voyage. The letter further stated the collector's opinion of the Passenger Act as amended was that wherever the term "Penalty" was used the amount should be collected by the Custom's Official, and that where the violation was construed as a misdemeanor, it should be reported to the United States District Attorney for prosecution. Said letter further enumerated the violation of the Act and the punishments incurred thereby. The

said report enclosed in the letter discussed the violations and apparent violations of the following sections of the Passenger Act, to wit: Section 1, relating to "Accommodation"; Section 2, relating to "Berths" and the separation of passengers; Section 3, relating to "Light and Ventilation"; Section 4, relating to the "Food, preparation of, etc."; Section 5, relating to "Hospitals"; Section 6, relating to "Discipline and Cleanliness"; and Section 7, relating to "Notices" required to be posted at the beginning of the voyage. The letter and enclosed report were admitted in evidence over the objection and exception of the plaintiffs in error, said letter and enclosure being marked Plaintiff's Exhibit 10.

V.

Said Court erred in admitting in evidence over the objection and exception of the plaintiffs in error Exhibit 11, which said exhibit consisted of two letters, one dated Honolulu, April 18th, 1911, addressed to E. R. Stackable, Collector of Customs, and signed "W. R. Frear, [87] Governor," containing a copy of a letter of A. de Sousa Canavarro, the said copy containing a discussion of the 58 deaths among the children on board the "Orteric," the lack of sanitary precaution on board the vessel stating, *inter alia*, that the lower decks of the vessel were never washed and that the mattresses were never aired, and concluding by asking whether civil and criminal proceedings should not be begun against the captain or officers for negligence.

VI.

Said Court erred in admitting in evidence over the



objection and exception of the plaintiffs in error a letter dated April 26th, 1911, addressed to R. W. Breckons, United States District Attorney, and signed by "E. R. Stackable, Collector of Customs," and suggesting that the report of the Grand Jury should be laid before the Secretary of Commerce and Labor, said letter being admitted in evidence as Plaintiff's Exhibit 12.

## VII.

Said Court erred in admitting in evidence over the objection and exception of the plaintiffs in error an extract from the Opinion of the Grand Jury which was admitted in evidence as Plaintiff's Exhibit 13, which extract from the report of the Grand Jury states that it, the Grand Jury, was requested by the Collector of Customs and the United States District Attorney to make a report relative to conditions on board the "Orteric" in order that the proper Department at Washington, in inflicting the fines and penalties, if any are to be inflicted, should have the benefit of the Grand Jury's investigation. The [88] report discusses the alleged violation of the section of the Passenger Act relating to the segregation of the sexes; it also stated that the law relative to ventilation was not complied with; that the hospitals were unfit for the purposes for which they were provided; that the provisions of the Act relating to cleanliness were violated in a manner which cannot be too strongly condemned and goes into details of the filthy condition of the vessel and lack of sanitary arrangements *and*. *The* extract from the report of the Grand Jury concludes that on the

whole, with the evidence before it, the Grand Jury would probably have returned indictments had it not been for the action of the owners in submitting the facts to the Department of Commerce and Labor for its determination.

### VIII.

Said Court erred in admitting in evidence over the objection and exception of the plaintiffs in error a letter dated Honolulu, May 15th, 1911, addressed to E. R. Stackable, Collector of Customs, and signed by "R. W. Breckons, United States District Attorney," enclosing a copy of the report of the Grand Jury relative to the "Orteric" matter and stating that the writer of the letter knew that the copy was a correct one, which letter was admitted in evidence and marked Plaintiff's Exhibit 15.

### IX.

Said Court erred in admitting in evidence over the objection and exception of the plaintiffs in error three letters addressed to E. R. Stackable, Collector of Customs, and signed by "Holmes, Stanley and Olson," The first of said letters, dated June 8th, 1911, requested time within which to present certain evidence regarding the charges [89] against Captain Findlay, Master of the S. S. "Orteric." The second letter, dated June 13th, 1911, submitted for presentation to the Department of Commerce and Labor the following:

1. Affidavit of Captain Findlay, master of the "Orteric."
2. Confirmatory affidavits of Arthur Atkins, chief



officer of the "Orteric," and John Hopkins Pugh, ship's Doctor on the "Orteric."

3. Affidavit of John Hopkins Pugh.

4. Affidavit of Edith Hyde, one of the nurses on the "Orteric."

5. Copies of Notice in the English, Portuguese and Spanish languages, which were posted according to the above-mentioned affidavit.

Said letters and above-mentioned affidavits and copies of notice were admitted in evidence as Plaintiff's Exhibit 18.

A third letter, dated April 27th, 1911, marked Plaintiff's Exhibit 5, contained a protest against the imposition of penalties for alleged violation of the Passenger Act of 1882, as amended.

#### X.

Said Court erred in admitting in evidence over the objection and exception of the plaintiffs in error exhibit 9, the same being a letter to the Secretary of Commerce and Labor dated June 17th, 1911, and signed by "E. R. Stackable, Collector of Customs," and containing Plaintiff's Exhibits 10, 11, 12, 13, 14, 15, 16, 17, and 18, relating to the "Orteric" matter.

[90]

#### XI.

Said Court erred in admitting in evidence over the objection and exception of the plaintiffs in error a letter dated, Washington, D. C., April 22d, 1911, addressed to the Department of Commerce and Labor and signed by "Baker, Sheedy and Hogan," requesting that the Department of Commerce and Labor instruct the Collector at Honolulu to report in detail

the causes of the detention of the “Orteric,” and to permit her to proceed on her voyage when the master entered into a bond to make good any penalty found to be due by the vessel or the master. Said letter was admitted in evidence as Plaintiff’s Exhibit 20.

## XII.

Said Court in its decision of January 20th, 1913, finding the facts in the case, in finding that there was a submission to the Secretary of Commerce and Labor for the purpose of obtaining remission of penalties incurred, or alleged to have been incurred by the S. S. “Orteric” or its master.

## XIII.

Said Court erred in its decision of January 20th, 1913, finding the facts in the case, in finding that the master of the S. S. “Orteric” led the Government Officers to understand that it was his intention to make a submission to the Secretary of Commerce and Labor for remission of penalties incurred or alleged to have been incurred by the S. S. “Orteric” or its master.

## XIV.

That said Court erred in finding that the S. S. “Orteric” and its master were estopped to deny that there was a submission to the Secretary of Commerce and Labor for [91] remission of penalties incurred or alleged to have been incurred.

## XV.

Said Court erred in holding that it was within the power of the Secretary of Commerce and Labor to remit the alleged penalties.



## XVI.

Said Court erred in its decision of January 20th, 1913, finding the facts in the case, in finding that there was an admission by the master of the "Orteric" of the alleged violations of the law.

## XVII.

Said Court erred in its decision, finding the facts in the case, in finding that the master applied for the remission of admitted penalties.

## XVIII.

Said Court erred in finding that the bond of the defendants was not a contract to submit the question of liability of the master and vessel to the determination of the Secretary of Commerce and Labor.

## XIX.

Said Court erred in its decision of January 20th, 1913, finding the facts in the case, in finding that the plaintiff was entitled to judgment against the defendants.

## XXI.

Said Court erred in overruling the motion in arrest of judgment filed February 5th, 1913.

## XXII.

Said Court erred in holding that the Complaint in the above cause stated a cause of action. [92]

## XXIII.

Said Court erred in rendering judgment against the plaintiffs in error upon June 17th, 1913.

## XXIV.

Said Court erred in adjudging that the defendant in error recover against the plaintiffs in error the

amount prayed in its Complaint or any amount whatever.

XXV.

Said Court erred in not dismissing the Complaint of the defendant in error.

XXVI.

Said Court erred in its decision finding the facts made on the 20th day of January, 1913, in finding that the bond sued upon the Complaint of the defendant in error, was ambiguous.

XXVII.

Said Court erred in rendering judgment against T. Clive Davies and W. H. Baird, plaintiffs in error, the sureties upon said bond.

WHEREFORE said plaintiffs in error pray that the judgment made and entered in said cause on the 17th day of June, 1913, be reversed, set aside and held for naught, and judgment ordered and directed in favor of the plaintiffs in error.

Dated, Honolulu, T. H., December 16th, 1913.

(Sgd.) HENRY HOLMES,

(Sgd.) WILLIAM L. STANLEY,

(Sgd.) CLARENCE H. OLSON,

(Sgd.) INGRAM M. STAINBACK,

Attorneys for Plaintiffs in Error.

Service of the foregoing Assignment of Errors this 16 day of December, 1913, is hereby admitted.

(Sgd.) JEFF McCARN,

U. S. District Attorney, Hawaii. [93]

[Endorsed]: No. 81. (Title of Court and Cause.)  
Assignment of Errors. Filed Dec. 16, 1913. A. E.



Murphy, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk. [94]

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[Title of Court and Cause.]

**Bill of Exceptions.**

BE IT REMEMBERED that on the 22d day of April, A. D. 1912, at a stated term of the above court, begun and held in Honolulu, in the City and County of Honolulu, in and for the District and Territory of Hawaii, before the Honorable Charles F. Clemons, District Judge for the Territory of Hawaii, the issues joined in the above stated cause between the said parties came on to be heard before the Court sitting without a jury, a trial by jury being specially waived by written stipulation, the United States being represented by Robert W. Breckons and C. H. Olson of the firm of Holmes, Stanley & Olson, appearing for defendant, the following proceedings being had, the plaintiff to sustain the issues on its part introduced the following evidence:

1. A bond dated the 22d day of April, 1911, payable to the United States of America, and signed by James F. Findlay as principal, and T. Clive Davies and W. H. Baird as sureties, the same being admitted in evidence and marked [95] exhibit 1, and being the same bond mentioned and set forth in the plaintiff's bill of complaint;

2. A cable, dated Honolulu, April 22, 1911, addressed to the Secretary of Commerce and Labor, Washington, and signed "Customs," the same being admitted in evidence and marked exhibit 2, a copy of

which marked exhibit 2, is hereto attached and made a part hereof;

3. A cable, dated Washington, April 22, 1911, addressed to "Customs," Honolulu, and signed "Cable, Acting Secretary," the same being admitted in evidence and marked exhibit 3, a copy of which marked exhibit 3 is hereto attached and made a part hereof;

4. A letter, dated Honolulu, April 17, 1911, addressed to Captain James Findlay, Master, "Orteric," Honolulu, and signed by E. R. Stackable, Collector, the same being admitted in evidence and marked exhibit 4, a copy of which marked exhibit 4 is hereto attached and made a part hereof;

5. A letter, dated Honolulu, April 27, 1911, addressed to E. R. Stackable, Collector of Customs, and signed by Holmes, Stanley & Olson, the same being admitted in evidence and marked exhibit 5, a copy of which marked exhibit 5 is hereto attached and made a part hereof;

6. A letter, dated Washington, December 4, 1911, addressed to the Collector of Customs, Honolulu, Hawaii, signed "Benjamin F. Cable, Acting Secretary," the same being admitted in evidence and marked exhibit 6, a copy of which marked exhibit 6 is hereto attached and made a part hereof;

That thereupon, plaintiff rested its case.

That defendants herein introduced no evidence, but rested their case, and the case was taken under advisement by [96] the Court.

That thereafter and on the 5th day of September, A. D. 1912, the plaintiff, by its attorney Robert W. Breckons, moved that it be allowed to reopen its case



and introduce further evidence, which motion was granted against the exception of the defendants who were represented at the hearing of said motion by I. M. Stainback, of the firm of Holmes, Stanley & Olson, attorneys for the defendants.

### **Exception No. 1.**

That thereafter on the 23d day of September, A. D. 1912, the case came on for further hearing, R. W. Breckons representing the plaintiff, and I. M. Stainback appearing on behalf of the defendants; that thereupon the plaintiff offered in evidence a letter dated Honolulu, April 22, 1911, addressed to E. R. Stackable and signed "Theo. H. Davies & Co., Ltd.," being a letter admitted in evidence and marked exhibit 7, a copy of which marked exhibit 7 is hereto attached and made a part hereof, to the offer of which objection was made, as follows (Transcript, pages 1 and 2):

"Mr. BRECKONS.—If the Court please, I desire to offer further testimony \* \* \* \*

"The COURT.—Yes.

"Mr. BRECKONS.—Letter of April 22d, 1911, addressed to E. R. Stackable, Collector of Customs; purported to be signed by Theo. H. Davies & Company. I'll ask counsel to admit that the letter was signed by Davies & Company, and the signature here is Mr. Baird's, one of the defendants, and that Davies & Company are agents for the 'Orteric.'

"Mr. STAINBACK.—We admit all except the last. We admit the letter was signed and the signature.

“The COURT.—You do not admit the fact of agency.

“Mr. STAINBACK.—We’ll admit that they’re agents as far as they’ve signed in that respect. I object to the admission of this letter. It is incompetent, irrelevant and immaterial. It is an attempt to vary a written [97] instrument by parole. It is otherwise not binding upon the defendant.

“The COURT.—The objection will be overruled and the exception noted.”

to which ruling the defendants duly excepted and the exception was allowed.

### **Exception No. 2.**

THAT THEREUPON the plaintiff offered in evidence a letter dated April 22, 1911, addressed to E. R. Stackable, Collector of Customs, Honolulu, and signed by Theo. H. Davies & Company, Limited, said letter being an application for clearance of the S. S. “Orteric,” and offering to furnish a bond covering the alleged violations of the Passenger Act, provided the facts concerning such alleged violation be submitted to the Secretary of Commerce and Labor for determination, which letter was admitted in evidence as Plaintiff’s Exhibit 8, a copy of which marked exhibit 8 is hereto attached and made a part hereof, to the offer of which objection was made by the defendants as follows (Transcript of Evidence, p. 2):

“Mr. BRECKONS.—Offer a letter written at the same day to E. R. Stackable, Collector of Customs, signed by W. H. Baird.

“Mr. STAINBACK.—We’ll admit the sig-



nature of the letter. We further object to this letter, not only irrelevant and immaterial and not binding upon the defendants and an attempt to vary by parole a written instrument, but further that it was not received until after the date of the bond.

“The COURT.—The letter will be admitted and the objection overruled.”

to which ruling an exception was duly noted and allowed.

### **Exception No. 3.**

THAT THEREUPON the plaintiff offered in evidence a letter dated Honolulu, June 17, 1911, and addressed to the Secretary of Commerce and Labor, Bureau of Navigation, [98] Washington, D. C., and signed by E. R. Stackable, Collector, which said letter refers to the cablegram of April 22, 1911, addressed to the Secretary by the Collector, and transmits a copy of the correspondence between Captain Findlay, the Customs Office and the United States Attorney, relative to the violation of the Passenger Act of 1882, and enumerates penalties incurred under sections 2, 3, 4, 5, 6, and 9 of said Act, amounting to \$7,960.00, and suggests that the fine be mitigated to \$2,000.00, which said letter was admitted in evidence as Plaintiff's Exhibit 9, a copy of which marked exhibit 9 is hereto attached and made a part hereof, to the offer of which an objection was made by the defendant as follows (Transcript of Evidence, p. 5):

“Mr. BRECKONS.—I offer in evidence a letter addressed to the Secretary of Commerce and

Labor, Bureau of Navigation, Washington, D. C., dated June 17, 1911, and ask counsel to admit for the purpose of making the offer that such a letter was sent signed by Mr. Stackable.

“Mr. STAINBACK.—We admit that. We object that it is immaterial, irrelevant and incompetent. Further, that it is after the date of the bond, and an attempt to vary a written instrument or to substitute a new contract.

“The COURT.—Objection overruled.”

to which ruling, an exception by the defendant was duly noted and allowed.

#### **Exception No. 4.**

THAT THEREUPON the plaintiff offered in evidence a letter from the Collector of Customs, Honolulu, to R. W. Breckons, United States District Attorney, containing a copy of the report of the Inspectors who measured and examined the “Orteric,” which said letter and enclosed report were admitted in evidence as Plaintiff’s Exhibit 10, copies of which marked exhibit 10 are hereto attached [99] and made a part hereof, to which offer objection was made by the defendants as follows (Transcript of Evidence, pages 5 and 6) :

“Mr. BRECKONS.—Mr. Stackable, I call your attention to Exhibit No. 9. I see one set of enclosures there. Can you tell me what those enclosures were?

“A. I don’t know that I can give them all off-hand or not. There was a letter that I wrote to Captain Findlay, there was a letter of the inspectors.



“Q. I’ll put them in one at a time. Was the letter which I now show you and which was exhibit 4 one of the enclosures?

“A. Yes, sir.

“Q. Was the letter or a copy of the letter which I show you, being letter addressed to myself, dated April 18, 1911, numbered 6,129, one of the enclosures?

“A. I am pretty sure it was. That’s the one that I called your attention to the fact that it might be a subject the Grand Jury would like to consider.

“Q. Are you not sure that it was? Didn’t you have your letter book this morning and you run over it?

“A. Yes, sir.

“Was the report of the inspector, which is attached to this letter to me, in your enclosure?

“A. Yes, sir.

“Mr. BRECKONS.—I offer those as part of the enclosures.

“Mr. STAINBACK.—I understand the enclosure was put in your letter to Washington.

“A. Not put; they go in a bunch and fastened them together.

“Mr. STAINBACK.—I object to this letter as immaterial, incompetent, not binding on the defendants in this case.

“The COURT.—The objection is overruled. The letters are admitted in evidence and the exception is noted.”

to which ruling, defendants duly excepted and the exception was allowed. [100]

**Exception No. 5.**

THAT THEREUPON the plaintiff offered in evidence two letters, which were admitted in evidence as Plaintiff's Exhibit 11, copies of which marked exhibit 11 are hereto attached and made a part hereof, one of which letters was addressed to his Excellency, Walter F. Frear, Governor of Hawaii, and signed by A. de Souza Canavarro, the Portuguese Consul, the other addressed to E. R. Stackable and signed by Governor Frear. The letter of Mr. Canavarro discusses the fifty-eight deaths among the children on board the "Orteric," and the lack of sanitary precautions on board the vessel, stating, *inter alia*, that the lower decks were never washed and the mattresses never aired, and concludes by asking whether civil and criminal proceedings should not be begun against the captain or officers for negligence. The letter from Governor Frear, dated April 18, 1911, enclosed the letter from A. de Souza Canavarro. To the offer of which said letters, objection was made as follows (Transcript of Evidence, pages 6 and 7):

"Mr. BRECKONS.—(Addressing E. R. Stackable, who was testifying after being duly sworn.) I show you two letters, one addressed to His Excellency, Walter F. Frear, Governor of Hawaii, and signed by Mr. Canavarro, the Portuguese Consul, and the letter addressed to you, signed by Governor Frear, and ask you whether or not they were enclosed.

"A. Yes, sir.



“Mr. BRECKONS.—They are offered as part of the enclosures. (Referring to the enclosure in Mr. Stackable’s letter to the Secretary of Commerce and Labor.)

“Mr. STAINBACK.—All of this is in the line of hearsay. I can see that it is material or relevant to this case, a letter expressing an opinion of a third person with reference to the condition of the ship. I don’t see that [101] it is binding on the defendants and object on that ground.

“The COURT.—The objection is overruled. The letter of Governor Frear, with Mr. Canavaro’s letter attached, are received in evidence, and the exception is noted as before. Of course, in receiving that, I am not saying that any facts in there, that that’s any evidence of what the conditions were, for it is hearsay; but it is merely evidence of what was submitted by the Collector to the Secretary.”

to which ruling the defendants duly excepted, which exception was noted and allowed.

### **Exception No. 6.**

THAT the plaintiff offered in evidence the following letter admitted in evidence as Plaintiff’s Exhibit 12, a copy of which marked exhibit 12 is hereto attached and made a part hereof, which letter was dated April 26, 1911, addressed to R. W. Breckons, United States District Attorney, and signed by E. R. Stackable, Collector of Customs, said letter suggesting that the report of the Grand Jury should be laid before the Secretary of Commerce and Labor to

which offer objection was made as follows (Transcript of Evidence, page 7):

“Mr. BRECKONS.—I show counsel a letter purporting to have been written by Mr. Stackable to myself on April 26, and ask him to waive any question about the letter having been signed.

“Mr. STAINBACK.—We admit that.

“Mr. BRECKONS.—(Addressing the witness, Mr. Stackable, who had been duly sworn and was testifying.) I show you this letter, No. 6167, addressed to myself, and ask you whether or not that was one of the enclosures in your letter to the Secretary.     A. Yes, sir.

“Mr. BRECKONS.—I offer it in evidence.

“Mr. STAINBACK.—Same objection. [102]

“The COURT.—Objection overruled.”

to which ruling exception by the defendants was duly noted and allowed.

### **Exception No. 7.**

THAT THEREUPON the plaintiff offered in evidence an extract from the opinion of the Grand Jury which was admitted in evidence as Plaintiff's Exhibit 13, a copy of which marked exhibit 13 is hereto attached and made a part hereof, which extract states that the Grand Jury was requested by the Collector of Customs and the United States District Attorney to make a report relative to conditions on board the “Orteric” in order that the proper department at Washington, in inflicting the fines and penalties, if any are to be inflicted, should have the benefit of the Grand Jury's investigation. The report



discusses the alleged violation of the Passenger Act, and concludes that on the whole, with the evidence before it, the Grand Jury would probably have returned indictments had it not been for the action of the owners in submitting the facts to the Department of Commerce and Labor for its determination. To this offer, objection was made as follows (Transcript of Evidence, pages 7 and 9):

“Mr. BRECKONS.—I find reference in that, Mr. Stackable, to the part of the Grand Jury report dealing with this subject. I will ask you whether or not you forwarded to the Department as part of this letter part of the Grand Jury report dealing with the question.

“A. Yes, sir.

“Mr. BRECKONS.—We’ll ask counsel to admit that so much of this copy of the Grand Jury report as deals with the subject of the “Orteric” was forwarded by Mr. Stackable to Washington.

“Mr. STAINBACK.—It is admitted, in order to save time, that all in the list Mr. Stackable has, was forwarded [103] to Washington, but we object to the admissibility and materiality.

“The COURT.—Objection is overruled and exception noted.”

to which ruling an exception was duly noted by the defendants and allowed.

### **Exception No. 8.**

THAT the plaintiff offered in evidence a letter dated Honolulu, May 15, 1911, addressed to E. R.

Stackable, Collector of Customs, and signed by R. W. Breckons, United States District Attorney, transmitting a copy of the report of the Grand Jury relative to the "Orteric" matter and stating that he personally knew that the copy was a correct one, which letter was admitted in evidence and marked Plaintiff's Exhibit 15, a copy of which marked exhibit 15 is hereto attached and made a part hereof, to which offer the defendants objected, which said objection was overruled, to which ruling an exception by the defendant was duly noted and allowed.

**Exception No. 9.**

THAT the plaintiff offered in evidence a letter dated June 8, 1911, addressed to E. R. Stackable, Collector of Customs, and signed by Holmes, Stanley & Olson, requesting time within which to present certain evidence regarding the charges against Captain Findlay, Master of the Steamship "Orteric." Another letter dated June 13, 1911, addressed to E. R. Stackable, Collector of Customs, Honolulu, signed by Holmes, Stanley & Olson, and submitting for presentation to the Department of Commerce and Labor, the following:

1. Affidavit of Captain James Findlay, master of the S. S. "Orteric" (which was admitted in evidence as Plaintiff's Exhibit 18, a copy of which marked exhibit 18 is hereto attached and made a part hereof); [104]
2. Confirmatory Affidavits of Arthur Atkins, chief officer of the "Orteric," and John Hopkins Pugh, ship's doctor of the "Orteric";
3. Affidavit of John Hopkins Pugh;



4. Affidavit of Edith Hyde, one of the nurses on the "Orteric";

5. Copies of notice in the English, Portuguese and Spanish languages, which were posted according to the above-mentioned affidavits.

Said above-mentioned affidavits and copies of notices above mentioned were admitted in evidence as Plaintiff's Exhibit 18, copies of which marked exhibit 18 are hereto attached and made a part hereof.

A third letter dated April 27, 1911, addressed to E. R. Stackable, Collector of Customs, signed Holmes, Stanley & Olson, which letter was admitted as Plaintiff's Exhibit 5, a copy of which marked exhibit 5 is hereto attached and made a part hereof, said letter containing a protest against the imposition of penalties for alleged violation of the Passenger Act of 1882. To the offer of plaintiff to introduce the above-mentioned letters and enclosures, objection was made by the defendants as follows (Transcript of Evidence, pages 12-14):

"Question by Mr. Breckons, addressed to Mr. Stackable, a witness for the plaintiff, who had been duly sworn and was testifying.

"Q. Now your next enclosure?

"A. The next enclosure was a Grand Jury report and then there were three letters from Holmes, Stanley & Olson. I have a sufficient memorandum for them.

"Q. You say you enclosed three letters?

"A. They are on file. They came back from Washington.

“Q. What I am trying to get at, what was in your letter? Can you tell us which one of the Holmes, Stanley & Olson letters it was? You have no memorandum?

“A. I think that they were. I think there were three letters of Holmes, Stanley & Olson, but I cannot identify them. [105]

“Q. Was this one of them, being exhibit 5?

“A. Yes, that’s one.

“Q. I show you a letter of April 22d bearing on it the marks,—I beg your pardon, June 8th, 1911, from Holmes, Stanley & Olson to you. Is that one of them?

“A. Yes, that’s one of them.

“Mr. BRECKONS.—I’ll ask counsel to admit that Holmes, Stanley & Olson wrote such a letter.

“Mr. STAINBACK.—Yes, we wrote that letter.

“Q. And the letter of Holmes, Stanley & Olson to you of June 13, 1911, was that one of the enclosures?

“A. Yes, sir.

“Q. In the letter of June 13th I find a reference to certain enclosures sent to Holmes, Stanley & Olson, five in number. The first, an affidavit of Captain James F. Findlay. I show you an affidavit of Captain James F. Findlay and ask you if that was it and whether that was forwarded. That was Captain Findlay’s affidavit referred to in the Holmes, Stanley & Ol-



son letter which was forwarded to Washington.

“A. Yes.

“Q. The second enclosure referred to are affidavits of Arthur Atkins and John Hopkins Pugh. I show you affidavits purporting to have been by Arthur Atkins and John Hopkins Pugh. Were they a part of Holmes, Stanley & Olson’s enclosures?

“A. Yes, sir.

“Q. Now, a third reference to an affidavit purporting to have been made by John Hopkins Pugh, was that a part of Holmes, Stanley & Olson’s enclosures?

“A. Yes, sir.

“Q. Affidavit of Edith Hyde. I show you an affidavit purported to have been made by Edith Hyde and ask you was that a part of Holmes, Stanley & Olson’s enclosures.

“A. Yes, sir.

“Q. And I show you copies, what purport to be copies of notice required by section 7 of the Passenger Act of 1882, as amended, and call your attention to a document headed ‘U. S. Navigation Laws, American Ships’ and ask you whether that is the enclosure referred to in Holmes, Stanley & Olson’s letter and forwarded by you to Washington. [106]

“A. Yes, sir.

“Mr. BRECKONS.—No. 15 offered in evidence.

“The COURT.—The objection is a blanket one and the exception is taken.”

to which offer the defendant objected, the objection was overruled, to which ruling an exception by the defendants was duly noted and allowed.

**Exception No. 10.**

THAT THEREUPON Plaintiff's Exhibit 9, being a letter to the Secretary of Commerce and Labor, signed by E. R. Stackable, Collector of Customs, and containing exhibits 10, 11, 12, 13, 14, 15, 16, 17, 18, was placed in evidence against the objection and exception of the defendants objection being made as follows (Transcript of Evidence, page 14):

“Mr. STAINBACK.—I object to the whole line of letters as immaterial, irrelevant and incompetent and an attempt to vary a written instrument, and further that they merely represent the opinion of the writers not in any way binding on the defendants.

“The COURT.—The objection is noted and overruled.”

to which ruling, an exception by the defendants was duly taken and allowed.

**Exception No. 11.**

THAT the plaintiff then offered in evidence a letter dated Washington, D. C., April 22, 1911, addressed to the Department of Commerce and Labor, and signed by Baker, Sheehy & Hogan, said letter being admitted in evidence as Plaintiff's Exhibit 20, a copy of which marked exhibit 20 is hereto attached and made a part hereof, which said letter requested that the Department of Commerce and La-



bor instruct the Collector at Honolulu to report in detail the causes of the [107] detention of the "Orteric" and to permit the "Orteric" to proceed on her voyage when the master entered into a bond to make good any penalty found to be due by the vessel or the master. To this offer the defendants objected and the objection was overruled, to which ruling an exception was duly made by the defendants and allowed.

### **Exception No. 12.**

THAT THEREUPON the Court continued the case for further disposition. That thereafter on January 20, 1913, the Court rendered its decision, a copy of which, marked exhibit "A," is hereto attached and made a part hereof, in favor of the United States, to which decision counsel for the defendant excepted on the ground that the decision was contrary to the law and the evidence and the weight of the evidence.

### **Exception No. 13.**

THAT THEREAFTER, and before the entry of judgment, counsel for the defendant, upon February 5, 1913, filed a motion in arrest of judgment on the ground that the Complaint in said cause failed to state a cause of action. That thereafter, on May 13, 1913, the Court overruled the motion in arrest of judgment, to which ruling an exception was duly made by the defendant and allowed.

THAT THEREUPON counsel for defendants filed a motion for a rehearing, which motion was taken under advisement by the Court until June 17, 1913, at which time said motion was denied.

**Exception No. 14.**

THAT THEREAFTER, on June 17, 1913, the Court ordered the decree and judgment to be entered against the defendants, to which judgment defendants duly excepted on the ground [108] that the judgment was contrary to the law and the evidence and the weight of the evidence, and the exception was allowed.

The foregoing Bill of Exceptions is based on the record and proceedings herein, the transcript of the stenographer's notes, together with all pleadings, exhibits, clerk's notes and documents on file, which are expressly made a part of this Bill of Exceptions and incorporated herein as fully as if they and each of them were actually set out herein in words and figures, and the defendants pray that all such pleadings, records, exhibits, clerk's notes, transcript of the testimony and all documents on file relating to said cause, be, by order of the Court, incorporated herein as fully as if they and each of them were actually set out herein in words and figures.

**[Order Allowing Bill of Exceptions.]**

The undersigned Judge having departed from the Territory of Hawaii immediately after the rendition of the judgment in the cause, and having remained absent therefrom until after the expiration of the term, and having stated at the time of the rendition of the judgment that there would be ample time after his return for the perfection of an appeal from said judgment, the foregoing Bill of Exceptions being found to be conformable to the truth and to be a true and correct record of the proceedings and



constituting a true and correct Bill of Exceptions, the same is hereby allowed this 16th day of December, 1913, as of the April Term, 1913.

(Sgd.) CHAS. F. CLEMONS,

Judge Presiding at the Trial of said Cause.

Rec't of copy hereof, prior to presentation, admitted on Dec. 13, A. D. 1913.

(Sgd.) ROBT. W. BRECKONS,

U. S. Atty. [109]

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[Title of Court and Cause.]

**Writ of Error [Original].**

In Error from the United States Circuit Court of Appeals for the Ninth Circuit to the District Court of the United States for the Territory of Hawaii.

The United States of America,—ss.

The President of the United States of America to the Honorable the Judge of the District Court of the United States for the Territory of Hawaii, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said District Court before you, between the United States of America, as plaintiff, and James F. Findlay, T. Clive Davies and W. H. Baird, as defendants, manifest error hath happened to the great damage of the said James F. Findlay, T. Clive Davies and W. H. Baird, as by its complaint appears; we being willing that error, if any hath been, shall be duly corrected, and full and speedy justice

done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the [189] same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same in the said Circuit Court of Appeals in the City of San Francisco, in the State of California, within 30 days from the date hereof, to wit, on the 15th day of January, 1914, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, the 16th day of December, in the year of our Lord one thousand nine hundred and thirteen and of the Independence of the United States the one hundred and thirty-seventh.

[Seal]

A. E. MURPHY,

Clerk of the District Court of the United States for the Territory of Hawaii.

The foregoing writ of error is hereby allowed this 16th day of December, 1913.

CHAS. F. CLEMONS,

Judge of the District Court of the United States for the Territory of Hawaii.

[Endorsed]: No. 81. (Title of Court and Cause.)

Writ of Error. Filed Dec. 16, 1913. A. E. Murphy,



Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk.  
[190]

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[Title of Court and Cause.]

**Citation [Original].**

In Error from the United States Circuit Court of Appeals for the Ninth Circuit to the United States District Court for the Territory of Hawaii.

The United States of America,—ss.

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, in the city of San Francisco, State of California, within thirty days from the date hereof, to wit, on the 15th day of January, 1914, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the Territory of Hawaii, wherein James F. Findlay, T. Clive Davies and W. H. Baird are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 16th day of December, 1913, and of the Independence of the United States the

one hundred and thirty-seventh year.

[Seal]

CHAS. F. CLEMONS,

Judge of the District Court of the United States for  
the Territory of Hawaii. [191]

**Admission of Service of Citation.**

Service of the foregoing citation, and receipt of a  
copy thereof, is hereby admitted this 16th day of  
December, 1913.

JEFF McCARN,

United States District Attorney for the Territory of  
Hawaii.

[Endorsed]: No. 81. (Title of Court and Cause.)  
Citation. Filed Dec. 16, 1914. A. E. Murphy,  
Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk.  
[192]

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[Title of Court and Cause.]

**Bond.**

KNOW ALL MEN BY THESE PRESENTS,  
that we, R. Klamp and George Rodiek, both of the  
City and County of Honolulu, Territory of Hawaii,  
are held and firmly bound unto the United States of  
America in the penal sum of Ten Thousand Dollars  
(\$10,000), lawful money of the United States, for  
the payment of which, well and truly to be made we  
bind ourselves, our successors, heirs, executors and  
administrators, jointly, severally and firmly, by these  
presents:

The condition of the above obligation is such that,  
whereas, in that certain case entitled United States  
of America, Plaintiff, vs. James F. Findlay, T. Clive



Davies and W. H. Baird, Defendants, filed in the U. S. District Court for the Territory of Hawaii, the United States of America did on the 17th day of June, A. D. 1913, in the said District Court recover a judgment against the said James F. Findlay, T. Clive Davies and W. H. Baird, for the sum of Eight Thousand Nine Hundred Sixty-two and Thirty-one Hundredths Dollars (\$8,962.30), from which said judgment [193] the said James F. Findlay, T. Clive Davies, and W. H. Baird are about to sue out a writ of error from the said District Court to the United States Circuit Court of Appeals for the Ninth Circuit, and whereas said James F. Findlay, T. Clive Davies and W. H. Baird desire pending decision on said writ of error to stay execution on said judgment of the said District Court:

NOW, THEREFORE, if the said James F. Findlay, T. Clive Davies and W. H. Baird shall duly prosecute their said writ of error with effect and moreover pay the amount of the said judgment in said original cause, together with interest and costs that may be awarded against them in case of their failure to sustain the said writ of error, then the above obligation to be void; otherwise to remain in full force and effect.

IN WITNESS WHEREOF we have hereunto set our hands and seals this 12th day of July, A. D. 1913.

(Sgd.) R. KLAMP.

(Sgd.) GEORGE RODIEK.

Approved as to sureties.

(Sgd.) C. C. BITTING,

Asst. U. S. Attorney.

[Endorsed]: No. 81. (Title of Court and Cause.)  
Bond. Filed Jul. 12, 1913. A. E. Murphy, Clerk.  
By (Sgd.) Wm. L. Rosa, Deputy Clerk. [194]

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[Title of Court and Cause.]

Before the Honorable CHAS F. CLEMONS, Judge  
of Said Court.

**APPEARANCES:**

For Plaintiff, R. W. BRECKONS, Esq., United  
States District Attorney.

For Defendants, I. M. STAINBACK, Esq., of  
the Firm of HOLMES, STANLEY &  
OLSON.

**Transcript of Testimony.**

Sept. 23, 1912.

Mr. BRECKONS.—If the Court please, I desire  
to offer certain further testimony. It is possible  
that I may duplicate some of it. I would suggest  
now, in these matters,—it is merely a suggestion,—  
that your Honor reserve a ruling on the objection to  
the admissibility.

The COURT.—Yes.

Mr. BRECKONS.—Letter of April 22, 1911, ad-  
dressed to E. R. Stackable, Collector of Customs;  
purported to be signed by Theo. H. Davies & Co.  
I'll ask counsel to admit that the letter was signed  
by Davies & Co. and the signature here is Mr.  
Baird's, one of the defendants, and that Davies &  
Co. are agents for the "Orteric." [195]

Mr. STAINBACK.—We admit all except the last.



We admit that the letter was signed and the signature.

The COURT.—You do not admit the fact of agency.

Mr. STAINBACK.—We'll admit that they're agents as far as they've signed in that respect. I object to the admission of this letter. It is incompetent, irrelevant, and immaterial; it is an attempt to vary a written instrument by parole; it is otherwise not binding upon the defendants.

The COURT.—The objection will be overruled and the exception noted.

Mr. STAINBACK.—Exception noted.

(Letter received in evidence and marked Plaintiff's Exhibit 7.)

Mr. BRECKONS.—Offer a letter written at the same day, to E. R. Stackable, Collector of Customs, signed by W. H. Baird.

Mr. STAINBACK.—We'll admit the signature of the letter. We further object to this letter, not only irrelevant and immaterial and not binding upon the defendants and an attempt to vary by parole a written instrument, but, further, that it was not received until after the date of the bond.

The COURT.—The letter will be admitted and the objection overruled.

(Letter received in evidence and marked Plaintiff's Exhibit 8.)

Mr. BRECKONS.—I'll ask counsel to make the other admission that Mr. Baird is the president of Davies & Co.

Mr. STAINBACK.—Yes.

**[Testimony of E. R. Stackable, for Plaintiff.]**

Direct examination of E. R. STACKABLE, a witness called on behalf of plaintiff, and sworn.

Mr. BRECKONS.—Q. Can you tell by looking at the letter I hand you, being Exhibit No. 2, when it was received? [196]

A. It was received on the 22d day of April, 1911.

Q. And when with reference to the time the bond was delivered to you? Before or after?

A. I think this one was after. There were two letters on that date.

Q. I'll show you the other one.

A. And one of them, my recollection is, was asking me to cable for authority to clear that ship and they're both dated the same day, and I believe I received them the same day, but my recollection is that this letter was received subsequent to this.

Q. That is, referring to No. 2 as being received subsequent to No. 1?

A. Yes, sir. As a matter of fact, I have an idea I was in Mr. Breckons' office when I received that second letter.

Mr. STAINBACK.—How is it—don't you stamp the date that they're received? Don't you have a stamp, "Collector of Customs Office"? You stamp the date of the receipt of the letters?

A. Yes, sir.

Q. Do you remember what day this letter was received on? A. Yes, sir.

Q. What day of the week was it, this second letter, No. 2, was received?



(Testimony of E. R. Stackable.)

A. I don't know that has any bearing on it. I have the matter in mind, it seems to me it was Saturday, but to get up and swear now that the 22d of April was Saturday—

Q. Why was this stamped the 24th underneath? Can you explain that?

A. Yes, I can, very readily. My recollection is that that letter was delivered to me in Mr. Breckons' office and after office hours and that I turned my stamp on Monday morning, and stamped other letters, and after stamping it 24, I had to put 22 knowing that I got it on that date. This was delivered after the bond was given.

Q. This was after office hours, is that correct? [197] I understand you to say that you thought this was delivered after the bond was given. They first wrote. If your're reading the first letter, we're talking about the second letter. I understood you to say a while ago that you thought it was delivered after the bond? A. Yes.

Q. That's to the best of your recollection?

A. Not after the bond was delivered.

Q. I understood you to say a while ago that this one was delivered before the bond and this second one after the bond was given. That's what I understood you to say.

A. I don't think that I said that. I didn't mean to say—

Q. As a matter of fact, do you know when it was delivered? Before or after the bond was given?

A. My recollection of this business has been fully

(Testimony of E. R. Stackable.)

explained and gone over with the Judge here. As I said before, this letter was the basis on which I cabled to Washington for authority.

Q. That's No. 1?

A. To clear that ship under their proposed proposition of a bond. Then, when we got the clerk dispatched on that cable, I received the same day, and, I think that I was in Mr. Breckons' office, in the afternoon, when that bond was written by the attorneys and submitted up there, at the time they proposed the form of a bond, they brought this application. That's my recollection, though I have to tax a man's memory just when he gets a letter on a subject of that kind.

Q. As long as the date was changed I thought probably for that reason you would remember how the letter was received and the facts because you have had some one day and many another.

A. If you're accustomed to stamping letters you'll know that sometimes your stamp doesn't make it clear to you.

The COURT.—These exhibits were offered this afternoon, 1 and 2, but some others have previously been put in evidence. I'll ask the clerk to number them. [198]

The CLERK.—7 and 8.

The COURT.—Will the record show that what was referred to by the witness as No. 1 is No. 7, and 2, No. 8.

Mr. BRECKONS.—I offer in evidence 6130, addressed to Capt. J. F. Findlay, master of the British



(Testimony of E. R. Stackable.)

S. S. "Orteric." Ask counsel to admit that that letter was sent, signed by Mr. Stackable, sent to and received by, Captain Findlay.

Mr. STAINBACK.—I understand that this letter is already in.

Mr. BRECKONS.—Yes, I beg your pardon. I offer in evidence a letter addressed to the Secretary of Commerce and Labor, Bureau of Navigation, Washington, D. C., dated June 17, 1911, and ask counsel to admit for the purpose of making the offer that such a letter was sent, signed by Mr. Stackable.

Mr. STAINBACK.—We admit that. We object that it's immaterial, irrelevant, and incompetent; further, that it is after the date of the bond, and an attempt to vary a written instrument or to substitute a new contract.

The COURT.—Objection overruled.

Mr. STAINBACK.—Exception.

The COURT.—Exception noted.

(Letter received in evidence and marked Plaintiff's Exhibit 9.)

Mr. BRECKONS.—Q. Mr. Stackable, I call your attention to exhibit No. 9. I see one set of enclosures there. Can you tell what those enclosures were?

A. I didn't get all that question.

Q. I say, it says "1 set of enclosures" at the end.

A. "1 set of enclosures," yes, sir.

Q. Can you tell me what those enclosures were? Do you know what those enclosures were?

A. I don't know that I can give them all offhand or not. There was a letter that I wrote to Captain

(Testimony of E. R. Stackable.)

Findlay; there was a letter of the inspectors.

Q. I'll put them in one at a time. Was the letter which I now show you, and which is exhibit 4, one of the enclosures? [199] A. Yes, sir.

Q. Was the letter, or a copy of the letter which I show you, being letter addressed to myself, dated April 18, 1911, numbered 6129, one of the enclosures?

A. I am pretty sure it was. That's the one that I called your attention to the fact that it might be a subject the Grand Jury would like to consider.

Q. Are you not sure that it was? Didn't you have your letter-book this morning and you run over it?

A. Yes, sir.

Q. Was the report of the inspectors which is attached to this letter to me in your enclosures?

A. Yes, sir.

Mr. BRECKONS.—I offer those as part of the enclosures.

Mr. STAINBACK.—I understand the enclosure was put in your letter to Washington?

A. Not put; they go in a bunch and fastened them together.

Mr. STAINBACK.—I object to this letter as immaterial, incompetent, not binding on the defendants in this case.

The COURT.—The objection is overruled; the letters are admitted in evidence and the exception is noted.

(Letter received in evidence and marked Plaintiff's Exhibit #10.)

The COURT.—Exhibit No. 10, being a letter from



(Testimony of E. R. Stackable.)

to Collector to Mr. Breckons with the inspectors' report attached.

Mr. BRECKONS.—I show you two letters, one addressed to His Excellency Walter F. Frear, Governor of Hawaii, and signed by Mr. Canavarro, the Portuguese Consul, and the letter addressed to you signed by Governor Frear, and ask you whether or not they were enclosed?

A. Yes, sir.

Mr. BRECKONS.—They are offered as part of the enclosures.

Mr. STAINBACK.—All of this is in the line of hearsay. I can't see that it's material or relevant to this case, a letter expressing an opinion of a third person with reference to the condition [200] of the ship. I don't see that it's binding on the defendants and object on that ground.

The COURT.—The objection is overruled. The letter of Governor Frear with Mr. Canavarro's letter attached are received in evidence and the exception is noted as before. Of course, in receiving that I'm not saying that any facts in there, that that's any evidence of what the conditions were, for it is hearsay; but it is merely evidence of what was submitted by the Collector to the Secretary.

(Letter received in evidence and marked Plaintiff's Exhibit No. 11.)

Mr. BRECKONS.—I show you a letter purporting to have been written by—I show counsel a letter purporting to have been written by Mr. Stackable to myself on April 26th, and ask him to waive any question about the letter having been signed.

(Testimony of E. R. Stackable.)

Mr. STAINBACK.—We admit that.

Mr. BRECKONS.—I show you this letter, No. 6167, addressed to myself, and ask you whether or not that was one of the enclosures in your letter, in your letter to the Secretary.

A. Yes, sir.

Mr. BRECKONS.—I offer it in evidence.

Mr. STAINBACK.—Same objection.

The COURT.—Objection overruled.

Mr. STAINBACK.—Exception.

The COURT.—Exception noted.

(Letter received in evidence and marked Plaintiff's Exhibit #12.)

Mr. BRECKONS.—Q. I find reference in that, Mr. Stackable, to the part of the Grand Jury Report dealing with this subject. I will ask you whether or not you forwarded to the Department as part of this letter, part of the grand jury report dealing with the question. A. Yes, sir.

Q. I take it you cannot tell what was in the Grand Jury report. You could not identify the part that was sent by you? [201]

A. I have a recollection of some of the statements made in it, but to be able to call them verbatim, I couldn't do that now.

Q. All right, I'll cover that later. Mr. Stackable, you this morning, without knowing that you have been in contempt of Court, made some marks on one of the exhibits in this case, the cablegram from Washington reading, "With approval United States Attorney, clear Orteric, 15,000 bond." You have



(Testimony of E. R. Stackable.)

“ERS,” April 23, 1911. Just tell us why you did that, or how it came about.

A. You called my attention this morning to the date we got here, June 23, and asked me if it wasn't a mistake and I said that I'd get the original and I'd take it out and see. It was a mistake of the party copying it in the office. I didn't realize, your Honor, that that was filed.

Q. I'll ask you then to amend that, Mr. Stackable. This copy of the cablegram, being Exhibit No. 3, when was it received by you?

A. On the 22d of April, 1911. I couldn't tell when. I saw the figures here this morning. I couldn't tell who put them there, but, of course, we can always get a certified copy. I can bring the original if it is necessary.

Q. You're sure it was received on the 22d?

A. I'm sure it was the 22d.

Q. Exhibit 1, 3, and 2, being the two cablegrams, was that forwarded as copies forwarded in your report to the Secretary?

A. I recollect that this, I confirmed this cablegram by a letter saying, “I hereby confirm my cablegram of even date—

The COURT.—The question was, were copies of this sent with the correspondence to the Treasurer or Secretary of Commerce and Labor; that is, in this bunch of enclosures, were there included copies of these cables? A. Why, yes, we sent.

Q. The question originally was, were these cables

(Testimony of E. R. Stackable.)

or copies thereof, made a part of the enclosures?  
[202]

A. I think they were. It would be most difficult for a man to tell absolutely. I can get my record up here and be certain of it. I think I confirmed that first cablegram by letter.

Mr. BRECKONS.—I show, you Mr. Stackable, a letter already admitted in evidence, exhibit 5, and ask you whether or not a copy of that was forwarded to the Department.

A. I think it was.

Q. How long will it take you to get your book up here? A. I believe that copy was made.

The COURT.—I can say that copy of the letter was.

(Recess.)

Mr. BRECKONS.—I'll ask counsel to admit that the firm of Baker, Sheney & Hogan were, July, 1911, April, 1911, July, 1911, and June, 1911, the attorneys resident in Washington for the "Orteric" and the owners of the "Orteric."

Mr. STAINBACK.—We can't admit it, your Honor; that is the first we've heard of it.

Mr. BRECKONS.—We'll ask counsel to admit that so much of this copy of the Grand Jury report as deals with the subject of the "Orteric" was forwarded by Mr. Stackable to Washington.

Mr. STAINBACK.—It is admitted, in order to save time, that all in the list Mr. Stackable has, was forwarded to Washington, but we object to the admissibility and materiality.



(Testimony of E. R. Stackable.)

The COURT.—Objection is overruled and exception noted.

(Report received in evidence and marked Plaintiff's Exhibit 13.)

Mr. BRECKONS.—I'll ask counsel to admit that this letter, Mr. Findlay, the master, addressed to Mr. Stackable, dated April 21, 1911, was sent to Mr. Stackable and this is a copy of the answer which Mr. Stackable sent to Findlay.

Mr. STAINBACK.—This is another letter which has a change of dates, I notice. I suppose it's correct and the dates are all right. I admit the letter, but I don't admit that it is material.

The COURT.—Is that made a part of the letter of June 17? [203]

Mr. BRECKONS.—Yes. I'll wait.

The COURT.—I'll admit that.

Mr. STAINBACK.—We object to that as immaterial and irrelevant.

The COURT.—I will receive that in evidence and note the exception.

Mr. STAINBACK.—Of course, we object to this whole line of testimony that it is an attempt to break down by parol evidence, vary the terms of a written instrument.

(Letter received in evidence and marked Plaintiff's Exhibit 14.)

Mr. BRECKONS.—What were the enclosures? What was the first enclosure?

A. The first one is my letter to Captain Findlay dated April 17, No. 6130.

(Testimony of E. R. Stackable.)

Q. That is, I show you Exhibit 4. Now, is that the first one you refer to, this letter?

A. That's it.

Q. Now, your next? A. Letter to you, No. 6129.

Q. This is Exhibit 10? A. Yes.

Q. All right. The answer to that should be a copy of the letter of the inspectors; that is the one attached to Exhibit 10 already? A. Yes.

Q. All right.

A. The next is a letter from the captain of the ship and signed by Davies & Co., dated April the 21st, making application to go outside for anchor.

Q. That's exhibit 14. What is the next one?

A. My letter to them, dated April the 21st.

Q. That is, exhibit No. 14, being the letter and the answer? A. Yes, sir.

Q. All right. Now, your next?

A. That was a cable.

Q. Which cable? A. The first cable. [204]

Q. I show you exhibit 2; is that an enclosure?

A. A copy of that.

Q. And exhibit No. —. What is your next?

A. Letter of April 22.

Q. What is that?

A. Requesting me to send this cable.

Q. The one you have just referred to now, exhibit No. 7, was the next enclosure? A. Yes.

Q. No. 8. Or, what is your next one?

A. The next one was another one from Davies & Co.

Q. Is this— A. That's it.



(Testimony of E. R. Stackable.)

Q. That's No. 8. All right. Now, the next?

A. Next, the bond.

Q. Which is in evidence in the case, exhibit 1.

A. The next is a copy of my letter.

Q. Now, what was that?

A. April 24, confirming this cablegram.

Q. I show you right there a letter being your No. 6511, 6911, addressed to E. R. Stackable. No. 9911, addressed to the Secretary of Commerce and Labor, April 24, 1911, and ask you whether that was one of the enclosures? A. Yes, sir.

Mr. BRECKONS.—That is offered in evidence.

Mr. STAINBACK.—I wish to object to the total number of enclosures.

Mr. BRECKONS.—Now, your next one?

A. The next one is a copy of the cablegram of April the 22d. Evidently that's a copy of that.

Q. The cablegram was received on the 22d? Is that exhibit No. 3? A. Yes, sir.

Q. Now, your next one?

A. Next is a letter from Governor Frear, April 18. The one you have already put in evidence. [205]

Q. Exhibit 11? A. Yes.

Q. Now, what's the next?

A. The next is a letter to you.

Q. What date?

A. April 26, asking for a copy of the Grand Jury Report.

Q. Is that your letter 6167?

A. 6167, exhibit 12.

Q. Now, the next one?

(Testimony of E. R. Stackable.)

A. Is a letter of December the 16th.

Q. Addressed to whom?

A. Your letter addressed to me sending the Grand Jury Report.

Mr. STAINBACK.—Was that enclosed in your letter to the secretary?

A. A copy of the Grand Jury Report.

Q. And the letter from Holmes, Stanley & Olson?

A. These letters came back. I think three letters went from Holmes, Stanley & Olson. You've got duplicates, I think, on your file now. They came from my office.

Q. The enclosure to which you have just now referred is a letter from myself to you, is it not, simply enclosing the copy of the Grand Jury Report requested by you?     A. Yes.

Q. Now, your next enclosure?

A. The next enclosure was a grand jury report and then there were three letters from Holmes, Stanley & Olson. I have a sufficient memorandum of them.

Q. You have already covered the Grand Jury Report.

A. The letters of Holmes, Stanley & Olson, are, in complete state, on file in this office.

Q. Have you anything here showing what those three letters were?

A. I have no memorandum of them. I have a pretty good recollection of what those letters were.

Q. You say you enclosed three letters?     [206]



(Testimony of E. R. Stackable.)

A. They're on file. They came back from Washington.

Q. What I'm trying to get at, what was in your letter? Can you tell us which one of the Holmes, Stanley & Olson letters it was? You have no memorandum?

A. I think that they were, I think there were three letters of Holmes, Stanley & Olson, but I cannot identify them.

Q. Was this one of them, being exhibit 5?

A. Yes, that's one.

Q. I show you a letter of April 22, bearing on it the marks, I beg your pardon. June 8, 1911, from Holmes, Stanley & Olson to you. Is that one of them? A. Yes, that's one of them.

Mr. BRECKONS.—I'll ask counsel to admit that Holmes, Stanley & Olson wrote such a letter.

Mr. STAINBACK.—Yes, we wrote that letter.

(Letter received in evidence and marked Plaintiff's Exhibit 16.)

Q. And the letter of Holmes, Stanley & Olson to you of June 13, 1911. Was that one of the enclosures? A. Yes, sir.

Q. In the letter of June 13, I find a reference to certain enclosures sent by Holmes, Stanley & Olson, five in number. The first, an affidavit of Capt. Jas. F. Findlay. I show you an affidavit of Capt. Jas. Findlay and ask you if that was it and whether that was forwarded. That was Capt. Findlay's affidavit referred to in the Holmes, Stanley & Olson letter which was forwarded to Washington. A. Yes.

(Testimony of E. R. Stackable.)

Q. The second enclosures referred to are affidavits of Arthur Atkins and John Hopkins Pugh. I show you affidavits purporting to have been by Arthur Atkins and John Hopkins Pugh. Were they a part of Holmes, Stanley & Olson's enclosures?

A. Yes, sir.

Q. Now, a third reference to an affidavit purporting to be made by John Hopkins Pugh. Was that a part of Holmes, Stanley [207] & Olson's enclosures? A. Yes, sir.

Q. Affidavit of Edith Hyde. I show you an affidavit purported to have been made by Edith Hyde and ask you was that a part of Holmes, Stanley & Olson's enclosures? A. Yes, sir.

Q. And I show you copies, what purported to be copies of notice required by Section 7 of the Passenger Act of 1882 as amended and call your attention to a document headed, "U. S. Navigation Laws, American Ships," and ask you whether that is the enclosure referred to in Holmes, Stanley & Olson's letter and forwarded by you to Washington.

A. Yes, sir.

Mr. BRECKONS.—No. 15. Offered in evidence.

The COURT.—The objection is a blanket one and the exception is taken.

Mr. STAINBACK.—I object to the whole line of letters as immaterial, irrelevant, and incompetent, and an attempt to vary a written instrument; and further, that they merely represent the opinion of the writers; not in any way binding on the defendants.



The COURT.—The objection is noted and overruled.

Mr. STAINBACK.—Exception is taken.

The COURT.—Exception allowed.

**[Certificate of Reporter to Transcript of Testimony.]**

I hereby certify that the foregoing is a full, true, and correct transcript of my shorthand notes in the above-entitled cause.

O. SOARES,  
Official Reporter.

Honolulu, T. H., October 25, 1913. [208]

[Endorsed]: No. 81. (Title of Court and Cause.)  
Transcript of Testimony. Filed October 25th, 1913.  
A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [209]

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**[U. S. Exhibit No. 1—Bond.]**

WHEREAS the Collector of Customs of the port of Honolulu, Territory of Hawaii, has given notice of J. F. Findlay, Master of the British Steamship "Orteric" that the said Master has incurred certain penalties on account of alleged violations of "The Passenger Act, 1882" as amended; and

WHEREAS the said Collector has been authorized by the Department of Commerce and Labor of the United States to grant immediate clearance to said Steamship upon a bond being furnished in the penal sum of Fifteen Thousand Dollars (\$15,000), approved by the United States District Attorney for the Territory of Hawaii, to insure the payment of such penalties for such violations aforesaid as shall

be determined by the Department of Commerce and Labor of the United States to have been incurred by the said Master after the presentation, within a reasonable time, by the said Master, or his agents or attorneys, and the officials of the United States at said Honolulu, of the facts, to said Department; and

WHEREAS a bond in the form of these presents and with the sureties therein named, has been approved by said United States District Attorney;

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS: That the said J. F. FINDLAY, as principal, and T. CLIVE DAVIES and W. H. BAIRD, both of said Honolulu, as sureties, are held and firmly bound unto THE UNITED STATES OF AMERICA in the penal sum of FIFTEEN THOUSAND DOLLARS (\$15,000), for the payment of which well and truly to be made, the said principal and sureties do bind themselves, their heirs, executors and administrators firmly by these presents:

THE CONDITION of the within and foregoing obligation is [210] such that if the said principal J. F. Findlay shall pay to the United States of America through the Collector of Customs at the port of Honolulu in the Territory of Hawaii the amount which the Department of Commerce and Labor of the United States shall, upon such presentation of facts, determine that the said principal is liable for on account of such penalties so alleged to have been incurred, then this obligation shall be null and void, otherwise of full force and effect.

IN WITNESS WHEREOF the said principal



and sureties have hereunto set their hands and seals this 22d day of April, 1911.

(Sgd.) JAMES F. FINDLAY. (Seal)

(Sgd.) T. CLIVE DAVIES (Seal)

(Sgd.) W. H. BAIRD. (Seal)

In presence of,

(Sgd.) WM. BUCHANAN.

(Sgd.) G. H. WHITNEY.

The foregoing bond is hereby approved as to form and sureties.

Dated, April 22, 1911.

(Sgd.) ROBT. W. BRECKONS,  
United States District Attorney for the Territory of  
Hawaii.

[Endorsed]: No. 81. (Title of Court and Cause.)  
U. S. Exhibit #1. Filed Apr. 22, 1912. A. E.  
Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy  
Clerk. [211]

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**[U. S. Exhibit No. 2—Cablegram, April 22, 1911,  
Customs to Secretary Commerce Labor.]**

Honolulu, April 22, 1911.

Send the following cablegram "VIA COMMERCIAL PACIFIC" subject to the terms and conditions printed on the back hereof which are agreed to.

SECRETARY COMMERCE LABOR—WASHINGTON.

Agents British steamer ORTERIC make application clear under bond covering alleged penalties amounting approximately ten thousand dollars pas-

senger act 1882. Recommend favorable consideration.

**CUSTOMS.**

Commercial Rate.

[Endorsed]: No. 81. (Title of Court and Cause.)  
U. S. Exhibit #2. Filed Apr. 22, 1912. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk.  
[212]

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**[U. S. Exhibit No. 3—Cablegram, April 22, 1911,  
Cable, Acting Secretary to Customs.]**

TIME 11:38 A.M. April 22, 1911.

SF. "USG" WASHINGTON, DC., 16.

**CUSTOMS,**

**HONOLULU.**

With Approval United States Attorney Clear  
Orteric Fifteen Thousand Dollar Bond.

**CABLE ACTING SECRETARY.**

[Endorsed]: No. 81. (Title of Court and Cause.)  
U. S. Exhibit #3. Filed Apr. 22, 1912. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk.  
[213]

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**[U. S. Exhibit No. 4—Letter, April 17, 1911,  
Collector to Findlay.]**

No. 6130.

LED.

Honolulu, Hawaii, April 17, 1911.

Capt. J. F. Findlay,

Master of Br. S. S. "Orteric,"

Honolulu, Hawaii.

Sir:

I am constrained to notify you that you are liable



to penalties for alleged violations of the Passenger Act of 1882, as amended by the Act of February 14, 1903, the Act of February 9, 1905, and the Act of December 19, 1908, as follows:

Section 2. **BERTHS:** This section provides that single male passengers shall be berthed in the fore part of the vessel, in a compartment divided off from the space or spaces appropriated to the other passengers by a substantial bulkhead. While the proviso seems to have been complied with, it seems that the single men could not get to their compartment without going through the compartment occupied by other passengers. The law imposes a fine of \$5 for each passenger carried or brought, for a violation of this section.

Section 3. **LIGHT AND VENTILATION:** From what I am able to learn, when daylight did not furnish sufficient light, electric lights were provided. Ventilation, however, seems to have been inadequate throughout each and every compartment in which steerage passengers were carried or brought. The caboose and cooking [214] arrangements No. 6130 2.

while well appointed were insufficient in capacity to properly prepare the food for the number of passengers carried on board. The latrines or closets seem to have been sufficient in number but not properly located, all having been placed upon the upper deck and no closets or toilet accommodations having been provided upon either of the decks on which the emigrant passengers were berthed. The penalty for violation of this section is \$250.

Section 4. **FOOD:** From the slight opportunity we have had to communicate with the passengers, it would seem as though there was sufficient food provided for adult passengers, but serious complaints have been received relative to furnishing mothers with infants and young children with the necessary quantity of wholesome milk or condensed milk for the sustenance of the children. From the reports of your doctor, it would seem that the milk was served but twice a day, which is clearly not the necessary quantity for the proper nourishment of infants and children and undoubtedly had something to do with the high rate of mortality during the voyage. A violation of this section is a misdemeanor and is punishable by a fine of \$500.

Section 5. **PHYSICIANS AND HOSPITALS:** While there seems to be a sufficient amount of hospital space the ventilation thereof seems to be wholly inadequate. The law imposes a penalty of not exceeding \$250 for a violation of this section.

Section 6. **DISCIPLINE AND CLEANLINESS:** No notice seems to have been posted in any of the compartments in which the emigrant passengers were berthed requesting them to observe proper sanitary conditions, and from the filthy condition of the ship upon arrival [215] at this port, it would No. 6130 3.

seem as though the officers in charge paid very slight attention to the requirements of this section. From reports received from my inspectors it would seem as though the decks or compartments in which the steerage passengers had been berthed had not been



washed or scrubbed out from the time you left Lisbon on or about February 16, 1911, until after your arrival at this port, April 13, 1911. Section 6 states in part that whenever the state of the weather will permit such passengers and their bedding shall be mustered on deck. From reports received, it would seem that the bedding has not been aired during the entire voyage. No arrangement seems to have been provided so that the emigrants could take a bath. Penalty for violation of this section is \$250.

Section 7. **SHIP'S COMPANY CANNOT VISIT STEERAGE QUARTERS:** No evidence is found that this section was posted as required by law, either written or printed in the language or the principal language of the passengers on board. A violation of this section is a misdemeanor and is punishable by a fine of \$100.

Section 9. **PASSENGER MANIFESTS, ETC.:** The manifest filed by you does not seem to be complete. It does not state the compartment or space occupied by the passengers during the voyage. The penalty for violation of this section is a fine not to exceed \$1,000.

Your attention is respectfully invited to Section 13 of the Act, relative to the collection of these penalties.

Prior to instituting proceedings for the enforcement of this penalty you will be given an opportunity to present any statements you may desire to make. I would suggest that whatever statements

you may desire to make, be made in the form of an affidavit. [216]

No. 6130 4.

Respectfully,

E. R. STACKABLE,

Collector.

[Endorsed]: No. 81. (Title of Court and Cause.)  
U. S. Exhibit #4. Filed Apr. 22, 1912. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk.  
[217]

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[U. S. Exhibit No. 5—Letter, April 27, 1911, Holmes,  
Stanley & Olson to Collector.]

HOLMES, STANLEY & OLSON.

ATTORNEYS-AT-LAW.

Honolulu, T. H., April 27, 1911.

E. R. Stackable, Esq.,

Collector of Customs for the Port of Honolulu,  
Honolulu, T. H.

Dear Sir:

On the 17th day of April, 1911, Captain James Findlay, Master of the British Steamship "Orteric" was notified by letter from you under that date that he was liable to penalties for alleged violations of the Passenger Act of 1882, as amended, as follows:

Section 2. \$5.00 for each passenger carried or brought on the last trip of the "Orteric" to Honolulu.

Section 3. \$250.

Section 4. \$500.

Section 5. \$250.



Section 6. \$250.

Section 7. \$100.

Section 9. \$1000.

On the 22d day of April, 1911, in accordance with authority cabled to you by the Acting Secretary of Commerce and Labor of the United States, clearance was granted the said "Orteric" [218] upon the filing with you of a bond in the penal sum of \$15,000, conditioned upon the payment by Captain Findlay of such amount as might be determined by the Department of Commerce and Labor to be the amount of liability of said Captain Findlay on account of such penalties.

In order to preserve the rights of Captain Findlay in the premises, we now formally enter protest against the imposition of the penalties aforesaid and all penalties whatever that may be imposed on account of alleged violations of the Passenger Act of 1882, as amended, during or in the course of the said trip of the said "Orteric."

We also beg to state that we shall file with you as soon as possible a full statement of the facts concerning the said alleged violations, to be submitted to the Department of Commerce and Labor in order that it may arrive at a proper determination of the matter.

Yours respectfully,

(Sgd.) HOLMES, STANLEY & OLSON,

Attorneys for Captain James Findlay, Master of the  
British Steamship "Orteric."

CHO/L.

[Endorsed]: No. 81. (Title of Court and Cause.)

U. S. Exhibit #5. Filed Apr. 22, 1912. A. E. Mur-

phy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk.  
[219]

[U. S. Exhibit No. 6—Letter, December 4, 1911,  
Cable to Collector.]

56983-N

COPY.

DEPARTMENT OF COMMERCE AND LABOR.

Office of the Secretary.

WASHINGTON.

December 4, 1911.

Collector of Customs,  
Honolulu, Hawaii.

Sir: The Department has received your letter of the 9th ultimo, and previous correspondence, transmitting the application of James Findlay, master, for relief from the following penalties incurred in the case of the steamer ORTERIC for violation of the Passenger Act of August 2, 1882:

Section 2, \$5 for each statute passenger	
(1,242) .....	\$6,210
Section 3, penalty of .....	250
“ 5, “ “ .....	250
“ 6, “ “ .....	250
“ 9, “ “ .....	1,000

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Total.....\$7,960

SECTION 2: It is charged that the single men were placed in a compartment where it was necessary for them to go through the compartment occupied by families in order to reach their berths, during the latter part of the trip, at least, single men



were berthed with the families in some instances. After investigation by the grand jury it was found that during the latter part of the voyage no attempt was made to separate the sexes properly. This condition is explained by the master who states that about ten days after leaving Gibraltar there was a riot with Portuguese male passengers on one side and Spanish males on the other, resulting in a pitched battle with knives, clubs, cleavers, and pistols. He claims that previous to this trouble the male passengers not occupying berths with their wives were properly set off from the other passengers; after the riot the Portuguese males refused to be berthed with the Spanish males, being in fear of their lives, and to prevent bloodshed and to maintain discipline the Portuguese were moved aft.

SECTION 3: The grand jury found that the law relative to ventilation was not complied with and they could not find any evidence whatever that the ventilating apparatus provided had been properly [220] approved before the vessel cleared; the port holes in the various compartments did not admit air for proper ventilation; notwithstanding the fact that there was an electric light plant on board no fans were provided. The use of such fans would have ameliorated such conditions, and the lack of ventilation was held to have contributed to the large mortality on the vessel during her voyage. When severe weather necessitated the closing of the port holes and hatches the rate of mortality increased, the ventilating apparatus not supplying sufficient air. The master claims that on leaving Oporto, Portugal,

three days before leaving Gibraltar, ten Portuguese officers, among whom he believes were Portuguese immigrant officials, inspected the ship and approved her ventilation. He claims that there were two ventilators, each not less than 12 inches in diameter, one in the forward part of each compartment and one in the after part, and additional ventilators for each compartment in the proportion of 2 for each additional 50 passengers, all carried at least 6 feet above the uppermost part of the vessel. This statement does not appear to be in accord with the finding of the grand jury, which went on board the vessel and apparently had every opportunity to become acquainted with the facts. The latrines were sufficient in number but were located on the upper deck where they could be used only by passengers able or willing to climb there, necessarily resulting in a filthy condition below the upper deck. You report, however, that while the latrines were sufficient in number, in the temporary structures sanitary conditions had been neglected, water being used but twice a day for flushing with powdered disinfectants in the meantime. Under these conditions accumulations of human filth remained for hours at a time, much of it being in evidence at the time of your inspection.

SECTION 5: The grand jury found that the hospitals on board were not as required by law and wholly unfit for the purpose for which they were provided; that the ventilation in them was poor and the space allotted too small. In some of the hospital spaces it was found that even ordinary con-



veniences were not provided for the inmates. They stated that the apparent ignorance and lack of cleanliness on the part of the passengers constituted no excuse for failure to provide accommodations. The master states that there were two hospital compartments on the upper deck ventilated by large skylights and port holes and thoroughly lighted; on account of the number of passengers two additional compartments were utilized; these were located about amidships on the shelter deck and were fitted with three coaling ports communicating with the upper deck; when weather permitted these were kept open; they were each not less than 20 inches square; each compartment also had a door opening into the fidley which was at all times open through the upper deck; these doors were 6 feet by 2, always open; they were also fitted with other ventilators and ventilating devices. The master, however, does not describe them. Your report indicates that there was a sufficient amount of hospital space but the ventilation was wholly inadequate.

SECTION 6: No regulation in regard to discipline and cleanliness were kept posted during the voyage and the compartments and spaces provided for or occupied by the passengers were not kept in a clean and healthy condition. The grand jury found that no attempt had been made to muster the passengers on the upper deck or to air or clean their bedding; the mattresses and bedding during the entire voyage, save in a few rare instances, were not taken from the berths where they were first placed. On arrival at Honolulu it was necessary to burn all the

mattresses. The decks were not washed and the filth apparently was allowed to remain, being sprinkled over with sawdust and disinfectants. The result was an almost intolerable [221] stench which existed even up to the day when the vessel was examined by the grand jury. No conveniences were provided for the use of the children except such as were improvised after the beginning of the voyage and were wholly unfit, and the grand jury states that it is to be wondered at that no more deaths occurred than actually took place. You state that from the filthy condition of the ship on arrival it appears that the officers in charge paid very slight attention to the requirements of cleanliness; the decks or compartments where the passengers were berthed appeared not to have been washed or scrubbed from the time the vessel left Lisbon, February 16, to its arrival at your port, April 13. In one compartment a ship's room was found with gear stowed between it and the ship's side; this space served as a latrine; the accumulation of filth was covered by disinfectants; sawdust and disinfectants alternating with filth formed layers on the floor, resulting in a stench which was sickening; the berths were filthy; no baths could be taken except in the public wash room; no chambers were provided and empty meat cans were utilized by some of the passengers. The grand jury states that the provisions regarding cleanliness "were violated in a manner which cannot be too strongly condemned." The master states that he, the ship's doctor, and other officers almost every day, and one or more persons



every day, inspected the vessel and passengers and warned them to keep themselves in a cleanly condition and stay on the upper deck as much as possible; to air their baggage and bedding when weather would permit, but with few exceptions they refused, fearing their belongings would be stolen. Because of the large number of passengers it was impossible to air the bedding without their assistance; the crew was at all times engaged in cleaning the decks and compartments. Breakfast was served before entering your port and remnants were thrown about the floors and decks instead of overboard as had been the custom; the ship's crew was obliged to prepare the vessel for entry and these remnants remained on the floors. The passengers tore clothe from the mattresses to make bags for carrying off their belongings and the contents of the mattresses were strewn together with the discarded rubbish. At the beginning of the voyage, regulations were posted but were torn down by the passengers. The ship's doctor states that he personally superintended the sanitary measures on board; that all compartments and decks were swept not less than twice daily and disinfected; that he would not permit the washing of compartments occupied by passengers because he believed that this would result in unavoidable dampness which would be detrimental; that all accumulations were rendered harmless and innocuous by disinfectants; that the sleeping compartments were scraped with shovels every day and swept; that the temporary hospital quarters were well suited for the purpose; that the mortality

on board was due largely to the concealment by parents of the ailments of their children and refusal to accept medical attention, and that there were the usual accommodations for washing by the passengers.

SECTION 9: The manifest filed by the master did not state the compartments or spaces occupied by passengers during the voyage. The master states that after the riot on board mentioned above, the shifting of the passengers in order to segregate the Spanish from the Portuguese resulted in some confusion, making it impossible for affiant to include in the list of passengers the exact compartments and spaces occupied by them thereafter.

From the papers submitted it is evident that this vessel with 1,242 passengers was navigated on a voyage of eight weeks under all conditions of weather in violation of practically all of the provisions of the Passenger Act having to do with the health, comfort, and [222] well-being of the passengers. The death of 57 children during the voyage marks this as the worst case ever submitted to the Department. The sexes were not properly segregated during a large portion of the voyage, the master stating that the confusion was such that it was impossible for him to state in the manifest the exact compartments and spaces occupied by the various passengers. The ventilation of the ship appears to have been wholly inadequate, this lack of ventilation in the opinion of the grand jury, increasing the rate of mortality. Ill-ventilated hospital facilities without adequate equipment were fur-



nished; the manifest of the vessel was not completed, and the sanitary conditions of the vessel were inexcusable. The Department concurs in the following extract from the report of the grand jury:

“We cannot emphasize too strongly the necessity for the observance of regulations requiring vessels to be kept in a clean and sanitary condition. When poor immigrants, perhaps unaccustomed to modern methods of sanitation, are brought into a tropical climate such as Hawaii, not only their own good, but the good of the community in general is subserved by a rigid insistence on compliance with the law.”

In the opinion of the Department, penalties aggregating \$7,960 were incurred in this case for violation of the sections enumerated and it declines to intervene in behalf of the offenders.

Respectfully,

BENJ. S. CABLE,  
Acting Secretary.

EDF—COPY.

[Endorsed]: No. 81. (Title of Court and Cause.)  
U. S. Exhibit #6 (Copy). [223]

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[U. S. Exhibit No. 7—Letter, April 22, 1911, Davies  
& Co. to Collector.]

Honolulu, T. H., April 22nd, 1911.

E. R. Stackable, Esq.,  
Collector of Customs.

Sir: We respectfully request that you will cable to the Secretary of Commerce and Labor, Washing-

ton, for permission to grant clearance to the British steamer "Orteric" upon a satisfactory bond being furnished for the payment of any penalties which may be imposed in respect of the alleged violations of the Passenger Act by that steamer, and full particulars regarding the matter to be furnished to the Department of Commerce & Labor for their determination of what shall be done in connection therewith.

We are, Sir,

Your obedient servants,

THEO. H. DAVIES & CO., LTD.,

(Sgd.) W. H. BAIRD,

Treasurer,

Agents, S. S. "Orteric."

[Endorsed]: No. 81. (Title of Court and Cause.)  
U. S. Exhibit #7. Filed Sep. 23, 1912. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk.  
[224]

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[U. S. Exhibit No. 8—Letter, April 22, 1914, Davies & Co. to Collector.]

Honolulu, T. H., April 22nd, 1914.

E. R. Stackable, Esq.,

Collector of Customs,

Honolulu, T. H.

Dear Sir: As agents of the British steamer "Orteric" now in the port of Honolulu, we make application for clearance of the said steamer for Victoria, British Columbia.

In view of the alleged violations of the Passenger



Act of 1882 aggregating penalties in the sum of about \$10,000, we will furnish to you an adequate bond in the sum of \$20,000, covering the same, providing that the facts concerning such alleged violations be submitted to the Secretary of Commerce and Labor for determination.

Yours respectfully,

THEO. H. DAVIES & CO., LTD.,

(Sgd.) W. H. BAIRD,

Treasurer.

[Endorsed]: No. 81. (Title of Court and Cause.)  
U. S. Exhibit #8. Filed Sep. 23, 1912. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk.  
[225]

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[U. S. Exhibit No. 9—Letter, June 17, 1911,  
Collector to Secretary of Commerce and Labor.]

No. 10106.

LED. Honolulu, Hawaii, June 17, 1911.

The Honorable,

The Secretary of Commerce and Labor,

Bureau of Navigation,

Washington, D. C.

SUBJECT: Br. S. S. "ORTERIC"—Fine Cast  
No. 123.

Sir: Referring to my cablegram of April 22, 1911, which reads as follows: "SECRETARY COMMERCE LABOR—WASHINGTON. Agents British steamer ORTERIC make application clear under bond covering alleged penalties amounting approximately ten thousand dollars passenger act

1882. Recommend favorable consideration. CUSTOMS," and to Department cablegram of like date, which reads as follows: "CUSTOMS HONOLULU. With approval United States Attorney clear ORTERIC fifteen thousand dollar bond. CABLE Acting Secretary," I have the honor to transmit herewith a copy of the Correspondence between this office, Capt. J. F. Findlay, master of the Br. S. S. "Orteric," the U. S. Attorney, etc., relative to violation of the Passenger Act of 1882 by the above named vessel.

I beg to report as follows: We have ascertained through the assistance of the Immigration Service that there were 1,242 statute passengers carried on the Br. S. S. "Orteric."

Penalties:

Section 2.	\$5 fine for each statute passenger carried or brought—1,242 at \$5.	\$6,210
Section 3.	Penalty of.....	250
Section 4.	Misdemeanor reported to U. S. Attorney .....	
Section 5.	Penalty of.....	250
Section 6.	“ “ .....	250
Section 7.	Misdemeanor reported to U. S. Attorney .....	
Section 9.	Penalty of.....	1,000
Total,		<hr/> \$7,960 <hr/>



This matter has been held in abeyance to await the pleasure of Messrs. Holmes, Stanley and Olson, attorneys for the master of the "Orteric," from April 22d to June 14, 1911.

I deem it proper to make the following suggestions, viz:

Section 2.	That the fine be mitigated to....	\$1,000
Section 3.	That in view of the filthy condi-	
Section 5.	tion of the ship, the total	
Section 6.	amount of the fines imposed	
	under each section be collected	750
Section 9.	That the fine be mitigated to....	250
		<hr/>
	Total,	\$2,000
		<hr/>
		<hr/>

Respectfully,

\_\_\_\_\_,  
Collector.

Enclosures—1 set.

[Endorsed]: No. 81. (Title of Court and Cause.)  
U. S. Exhibit #9. Filed Sep. 23, 1912. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk.  
[227]

[U. S. Exhibit No. 10—Letter, April 18, 1911,  
Collector to U. S. Attorney.]

No. 6129.

LED.

Honolulu, Hawaii, April 18, 1911.

Hon. R. W. Breckons,  
U. S. District Attorney,  
Honolulu, Hawaii.

Sir: I transmit herewith for your information and for such action as you may deem proper in the premises, a copy of the report of the Deputy Collector and Inspectors who measured and examined the Br. S. S. "Orteric" which vessel arrived at this port on the 13th instant with emigrants from Oporto, Lisbon, and Gibraltar.

From the report you will notice that 1,552 emigrants were taken on board this vessel; there were 14 births during the voyage which would make a total of 1,566. There were 58 deaths among the passengers, I believe all being children with the exception of one.

As I understand the provisions of the Passenger Act of 1882 as amended by the Act of February 14, 1903, the Act of February 9, 1906, and the Act of December 19, 1908, wherever the term "penalty" is used, this office should collect the amount of the penalty and where the violation of the section is construed to be a misdemeanor, it should be submitted to you for prosecution. As I interpret the violations, they are as follows:



Section 2, \$5 for each passenger carried or brought.

Section 3, fine of \$250.

Section 4, misdemeanor punishable by fine of not more than \$500.

Section 5, penalty not exceeding \$250.

Section 6, penalty not exceeding \$250.

Section 7, misdemeanor punishable by fine of not more than \$100.

Section 9, location of each passenger carried or brought, does not seem to be clearly stated in the passenger lists submitted to this office. [228]

In the matter of interviewing the emigrants to ascertain whether they were properly cared for during the voyage, I desire to state for your information that the emigrants are under quarantine by the Territorial Board of Health and it seems quite impossible for my deputies to interview them without violating the rules of said Board.

It seems to me that in view of the high rate of mortality on this ship and the filthy condition of the vessel, that it is a subject that might be worthy of the consideration of the Grand Jury.

I will submit to you at a later date a copy of my notice to the master of the vessel relative to fines under the various sections.

Respectfully,

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Collector.

Enclosure—1. [229]

LED.

Honolulu, Hawaii, April 17, 1911.

The Collector of Customs,

Honolulu, Hawaii.

Sir: Having been assigned the duty of examining and inspecting the British steamer "Orteric," in re Passenger Act of 1882, we beg herewith to respectfully report our findings as follows:

The Br. S. S. "Orteric" cleared from Oporto, Portugal, on February 21, 1911, with 300 Portuguese emigrants. Leaving Oporto, she arrived at Lisbon on February 22, 1911, where 252 more were awaiting her arrival and then she proceeded to Gibraltar, Spain, arriving on February 24, 1911, where she took on 1,000 Spanish emigrants, completing her passenger list, all of which were destined for Honolulu. Departing from Gibraltar with a total of 1,552 souls aboard, she arrived at this port on the morning of the 13th day of April, 1911, with but 1,508 souls, 44 souls less than at the beginning of her voyage.

This apparent discrepancy is accounted for in the deplorable high death rate occurring during the voyage, there being 58 deaths among the emigrants. There were also 14 births, which added to the total number embarked at the three different ports, makes a total of 1,566 and deducting the number of deaths, 58 (one death occurring on the morning of arrival) will leave a total of 1,508 souls.

Judging from the general appearance of the children, one is inclined to believe that the reason for such high mortality among them was the lack of proper and sufficient nourishment, and we would



recommend a more thorough investigation along these lines under Section 4. [230]

Section 1. ACCOMMODATION: The Br. S. S. "Orteric" has two decks on which passengers were carried which, for the purpose of this report, we designate as the "first deck" above the lowest passenger deck, and the "second deck" above the lowest passenger deck, which conform to the requirements of the Passenger Act of 1882.

Section 2. BERTHS: An apparent violation of this section appears in the fact that single male passengers, while berthed by themselves according to law, were obliged to pass through the compartments assigned to married people in order to reach the upper deck. In one instance a few single men were berthed in the same compartment with families. While the berths conformed to the requirements of the law it was learned from the ship's doctor that the bedding, which consisted of mattresses and pillows filled with coarse straw, and of blankets, was neither changed nor aired during the entire voyage. From the Chief Steward, who accompanied our inspection, and from our own observations, we found abundant verification of these violations of the section.

Penalty—\$5.00 for each passenger carried or brought on the vessel.

Section 2. LIGHT AND VENTILATION: The ventilation was inadequate throughout the compartments occupied by steerage passengers. Fresh air, in the main, being introduced only through port and hatchways. In some instances wind sails were used

at times. The light was insufficient on the first deck above the lowest passenger deck. Hatchways and companionways were in a condition to be fully approved. The caboose, while well appointed, was deficient in capacity, even under more favorable supervision, for the requirements of the number of passengers carried, particularly as such a large number required special diet because of illness. The latrines seemed to have been sufficient in number, though in the [231] temporary structures sanitary conditions had been neglected, water being used but twice a day for flushing with powdered disinfectants in the meantime. Under these conditions accumulation of human filth remained for hours at a time, much of it being in evidence at the time of our inspection. The location of these structures on the open upper deck rendered their remoteness from the passenger compartments a serious hardship and resulted in the frequent commission of nuisance in the secluded corners of the sleeping quarters. In this connection it may be stated that no chambers were provided for the children, and few, if any, for the invalids, though such vessels were improvised from empty meat cans by some of the passengers.

Penalty for violation of the provisions of this section is not to exceed \$250.00.

Section 4. FOOD, PREPARATION OF, ETC.: Numerous complaints in respect to the proportions and quality of food furnished were noted among the passengers but, after a careful investigation into the merits of said complaints, and after the Chief Steward's submission of a daily issue sheet from



which comparisons were made with U. S. Navy rations, we feel justified in discrediting the alleged complaints as regards the quantity of daily issue to each passenger. From an inspection of such of the ship's stores as were exhibited, it was evident that the quality was good though perhaps not entirely conforming to the needs and habitual diet of the passengers carried. In proper hands, it would seem that much more might have been made of the food issued than the cooks were able to accomplish, especially in catering to the peculiar tastes of the passengers carried. The ship's doctor informed us that while probably a sufficient quantity of condensed milk was issued for use of infants, it was deficient in fats and hence was lacking in nutrition, a fact attested by [232] the imaciated condition of many of the children. It seems proper in this connection to state that milk was issued but twice daily, which is clearly not frequently enough for the proper nourishment of the infants many of whom became deprived of mother's milk en route.

Tables and seats were provided in all the compartments, though not generally used as food was served in the berths. With a single exception accommodations were insufficient to seat all the passengers in three sittings, as required in Department Circular of August 6, 1909.

Penalty for every wilfull violation of the provision of this section is \$500.00.

Section 5. HOSPITALS: The hospitals provided were ample in area and conformed substantially to the requirements of the law, with this ap-

parent exception: ventilation as elsewhere, was wholly inadequate. In most instances, being furnished only through the medium of a small 9" port. Owing to the extensive prevalence of measles (?), two whole compartments in the bunker section of the ship were converted into emergency hospitals. Their proximity to the engines and the scanty ventilation rendered them uncomfortable from the heat. Penalty for violation of this section \$250.00.

Section 6. DISCIPLINE AND CLEANLINESS: Too much emphasis cannot be placed on the foul condition in which all the passenger compartments abounded.

Acting under the direction of the ship's doctor no water was used for scrubbing the decks on which passengers were carried during the entire voyage. Sawdust and powdered disinfectants alternating with filth formed layers of varied thickness on the floors and the resulting stench was sickening.

The berths which were used both as beds and tables were, in many instances, reeking in filth. In one compartment a ship's boom was found with gear stowed between it and the ship's side. This space served as a latrine, to all intents and purposes, and was so [233] used by the occupants of that compartment under stress, and the consequent accumulations of filth throughout the voyage were but partly strangled by the disinfectants used.

No notice requiring passengers to observe proper sanitary rules were posted in any part of the vessel.

For neglect or violation of any of the provisions of this section, the penalty is \$250.00.



Section 7. NOTICES: There was no evidence of this section having been posted. The Captain, however, stated that the law, in this respect, had been complied with at the beginning of the voyage.

Respectfully,

(Sgd.) M. W. TSCHUDI,  
Inspector.

(Sgd.) J. G. B. CAMERON,  
Inspector.

Countersigned:

(Sgd.) L. R. MEDEIROS,  
Deputy Collector.

(Sgd.) C. J. COOPER,  
Examiner.

[Endorsed]: No. 81. (Title of Court and Cause.)  
U. S. Exhibit #10. Filed Sep. 23, 1912. A. E.  
Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy  
Clerk. [234]

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[U. S. Exhibit No. 11—Letter, April 18, 1911,  
Governor to Collector.]

COPY—LD.

EXECUTIVE CHAMBER.

Honolulu, Hawaii, April 18, 1911.

E. R. Stackable, Esq.,  
Collector of Customs,  
Honolulu, T. H.

Sir: As requested orally this morning, I transmit herewith a copy of the letter of A. de Sousa Canavarro, Consul General for Portugal and Vice-Consul for Spain, to me this date regarding the treat-

ment of immigrants on the British SS. "Orteric," recently arrived at this port.

Very truly yours,

(Signed) W. F. FREAR,

Governor. [235]

COPY—LD.

10106.

Consulado Geral

de

Portugal em Hawaii.

Honolulu, Hawaii, April 18, 1911.

His Excellency Walter F. Frear,

Governor of Hawaii.

Honolulu, Hawaii.

Sir: I have the honor to bring to your attention the sad occurrence of 58 deaths among the children of Portuguese and Spanish immigrants arriving at the port of Honolulu on the 13th instant on board the British Steamship "Orteric."

Besides an individual investigation on the day of their arrival, at my request to the Board of Immigration, another investigation was made on board the said steamer in the presence of Dr. Victor Clark and Hon. A. Lindsay, Jr., the Attorney General of this Territory, and officers and physicians of the steamer. This investigation revealed the fact that measles broke out on the steamer on the Atlantic approximately 12 days after departure from Gibraltar, on the 24th of February last. During the 48 days of voyage, the lower decks of the steamer, where the passengers lived, were never washed, but simply swept three times a day and constantly cov-



ered with an abundance of disinfectants; the mattresses were never aired; and the absence of chambers, together with the fact that the water-closets were all located on the upper deck, must have affected the general hygienic condition of the immigrants.

The statement of Dr. Pugh, an English physician, as also the statement of Dr. Neves, a Portuguese assistant, and of Lieut. Costa, proved undoubtedly that the stubbornness of the immigrants was a serious obstacle to the efforts made to check the march of the epidemic, but, admitting that in other respects, the "Orteric" is one of the best equipped vessels that ever arrived in this port, [236] I cannot help but consider that the great mortality must, in part, have been caused by the above mentioned conditions.

Under the circumstances, I would respectfully ask your Excellency to call the attention of the United States District Attorney, or other proper official, as to whether criminal proceedings should not be begun against the Captain or officers of the vessel for their negligence, and also as to whether the Attorney General of this Territory should not take civil proceedings against the steamer in behalf of the sufferers of such negligence.

I would also respectfully bring to your attention the fact that I am informed that the "Orteric" will leave this port tomorrow. With the highest respect

and consideration, I have the honor to be, sir,

Your Excellency's most obedient servant,

A. DE SOUZA CANAVARRO,

Consul General for Portugal and Vice-Consul for  
Spain.

[Endorsed]: No. 81. (Title of Court and Cause.)  
U. S. Exhibit #11. Filed Sep. 23, 1912. A. E.  
Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy  
Clerk. [237]

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[U. S. Exhibit No. 12 — Letter, April 26, 1911,  
Collector to U. S. Attorney.]

No. 6167.

TREASURY DEPARTMENT.

United States Customs Service.

Port of Honolulu, Hawaii,

April 26, 1911.

Hon. R. W. Breckons,

U. S. District Attorney,

Honolulu, Hawaii.

Sir: I understand that the subject of the alleged violation of the Passenger Act of 1882, which formed the subject of my letters of the 18th instant, Nos. 6129 and 6131, was taken up by your Honorable Grand Jury which is in session at the present time. I am quite of the opinion that the report of the U. S. Grand Jury would be a very important document to lay before the Secretary of Commerce and Labor relative to the alleged violation of the Passenger Act of 1882 which no doubt will also touch upon the care and treatment of the emigrants on the voyage, and I am also quite certain in my own mind that



the Secretary of Commerce and Labor would be pleased to have an expression of opinion from the Grand Jury in order to make a comparison between the report of the customs officers' examination of the steamer and the finding of the Grand Jury.

If the report of the Grand Jury is made to you, I will consider it a personal favor if you will furnish me with an extract from this report touching upon the findings in the "Orteric" case. If, however, the report is not made to you, I would be pleased to have you take the matter up with the foreman of the Grand Jury and if consistent with law and regulations governing such bodies, I would be pleased to have a copy of the report to submit to the [238] Honorable Secretary of Commerce and Labor with my report.

Respectfully,  
(Sgd.) E. R. STACKABLE,  
Collector.

[Endorsed]: No. 81. (Title of Court and Cause.)  
U. S. Exhibit #12. Filed Sep. 23, 1912. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [239]

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**[U. S. Exhibit No. 13—Report.]**

During the session our attention was called to an alleged violation of the navigation laws of the United States, and particularly the Passenger Act of Congress of August 20, 1882, relative to steamships carrying immigrant passengers. We investigated particularly the case of the S. S. "ORTERIC," arriving in Honolulu on April 13, 1911. The

“ORTERIC” cleared from Oporto, Portugal, on February 21, 1911, arriving at Lisbon on February 22d, and at Gibraltar, Spain, on February 24, 1911, departing from the latter port finally for Honolulu. We have been unable to ascertain with exact accuracy the number of immigrants carried by her. When she arrived at Honolulu there were something over 1500 souls on board.

We have returned no indictments under the Act in question. When we completed our investigation it was reported to us by the Collector of Customs at Honolulu that a proper bond had been given by the owners of the vessel for the payment to the United States of America of all penalties which might have been incurred. There are but few provisions of the Act which provide for imprisonment as punishment for their violation, and as to these provisions, while perhaps some purely technical violation may have occurred, yet it was of such a nature that the Court upon conviction would in all probability have inflicted only a fine.

However, at the conclusion of the investigation we were requested by the Collector of Customs and the United States District Attorney to make a report relative to conditions on board of the vessel, in order that the proper department at Washington, in inflicting the fines and penalties, if any are to be inflicted, should have the benefit of the result of our investigation. It also appeared to us that a report thereon might be of some assistance [240] to both the territorial and federal officials in the future, where immigrants are being brought to the territory.

We ourselves visited the “ORTERIC,” and had



before us some of the federal officials connected with the quarantine service and the customs service, some of the persons connected with the boat, and one of the officials of the Territorial Board of Immigration. We were thus able to get a fairly intelligent understanding of conditions as they existed on board, particularly with reference to compliance with the requirements of the Passenger Act.

In the construction and arrangement of the vessel, single male passengers, while berthed by themselves according to law, were obliged to pass through the compartments assigned to married people in order to reach the upper deck of the vessel. Whether this was a violation of the provisions of the law relative to the sexes being kept separate and apart, we are not prepared to say. However, the evidence disclosed that beyond question, during the latter part of the voyage no attempt was made to have the law relative to separation of sexes complied with, and single men occupied berths in compartments set apart for married men and women, and married people occupied compartments set apart for single men. There appears to have been some trouble on board of the vessel which, it seemed to the officers of the vessel, rendered it advisable to keep Portuguese immigrants and Spanish immigrants in different parts of the vessel. Subsequent to this trouble, all regulations relative to separation of the sexes were disregarded.

The law relative to ventilation was not complied with, according to the evidence submitted to us, nor could we find [241] evidence whatever that the

ventilating apparatus really provided had been approved by the proper immigration officials of the port or place from which the vessel was cleared, an approval which is necessary under the terms of Section 3 of the Act, where the method of ventilation really provided does not comply with the law of the United States. Some inspection was had when the vessel sailed from Portuguese ports, but none before she sailed from Gibraltar. A system of ventilation might well be sufficient for six or seven hundred immigrants, and not sufficient and proper for fifteen hundred. The port-holes in the various compartments did not admit air for proper ventilation. Notwithstanding the fact that there was an electric light plant on board, there were no electric fans provided. The use of these fans, at a very small cost, might have ameliorated conditions.

We found from the evidence that lack of ventilation to some extent contributed to the large mortality on the vessel during her voyage. When severe weather necessitated closing some of the port-holes and hatches, the rate of mortality increased, the ventilating apparatus itself not supplying sufficient air.

The food on board appears to have been ample and of good quality. Perhaps the method of its preparation did not quite accord with the previous habits of the immigrants, but as to this no complaint can be made. Tables and seats were provided in the compartments. They were not, however, sufficient to seat all of the passengers in three sittings.

There was some uncertainty in the testimony as



to the condensed milk furnished for the use of infants. We investigated [242] this as carefully as we could, owing to the fact that the mortality on board was almost entirely confined to infants. From the condition of the evidence, however, we would not be inclined to attach any blame to the owners of the vessel on this account.

The hospitals on board of the vessel were not as required by law, and in our opinion from the evidence, wholly unfit for the purposes for which hospitals are provided. The ventilation in them was poor, and the space allotted to them entirely too small. The compartments used as lying-in hospitals were wholly inadequate in every respect, and in some instances, as to these latter hospitals, we found that even ordinary conveniences were not provided for the inmates. In this respect we believe that the apparent ignorance and lack of cleanliness constitute no excuse for failure to provide accommodations. With the class of passengers such as were brought on the "ORTERIC" excess of care relative to hospitals is more desirable than a failure to comply strictly with the law.

The provisions of the Passenger Act relative to *cleanliness* were violated in a manner which cannot be too strongly condemned. On the lower deck, on which passengers were berthed, neither closets nor conveniences were provided for the passengers, and this is also true of the deck above the lower deck. All of the water-closets on board of the vessel were on the upper deck, and could be used only by passengers able or willing to climb there. No proper

method appears to have been adopted to protect the vessel against the filthy condition which was necessarily created. The decks were not washed, and the filth apparently was permitted to remain, being sprinkled over with sawdust and some kind of disinfectant. [243] The result was an almost intolerable stench, which existed even up to the day when the vessel was examined by us.

No conveniences whatever were originally provided for the use of children, and such as were provided were improvised after the vessel had commenced her voyage, and were in our judgment wholly unfit from all standpoints.

No arrangements seem to have been made by which the immigrants might keep themselves in a cleanly condition, had they so desired. No bath rooms were provided, and up to within a few weeks of the completion of the voyage, the only way in which a bath of any kind could be indulged in was in the public wash room. A short time before the vessel arrived in Honolulu, a water pipe was fixed up in such a way that something resembling a shower bath might be taken, but there was little privacy even as to this.

No attempt appears to have been made to muster the passengers on the upper deck when the weather permitted, as is provided by law. Nor was any attempt whatever made to air or clean the bedding of the immigrants. The mattresses and bedding used by them were never during the entire voyage save in a few rare instances where the passengers themselves acted, taken from the berths where they



were first placed. When the vessel arrived at Honolulu, it became necessary to burn all of the mattresses.

While it is true that the immigrants on the vessel were of a class who are not over-cleanly in their own homes, yet some of them evinced a desire to in some degree better the conditions existing on the boat. Some of the passengers improvised conveniences of their own. In any event, however, no opportunities were afforded them for keeping clean, and it is to be wondered at that no more deaths occurred than actually did take place. [244]

On the whole, we are of the opinion that the Passenger Act was in a number of respects violated, and with the evidence before us, would probably have returned indictments had it not been for the action of the owners of the vessel in frankly submitting the facts to the Department of Commerce and Labor for its determination, and agreeing to abide by whatever decision that department might make. We cannot emphasize too strongly the necessity for the observance of regulations requiring vessels to be kept in a clean and sanitary condition. When poor immigrants, perhaps unaccustomed to modern methods of sanitation, are brought into a tropical climate such as Hawaii, not only their own good, but the good of the community in general is subserved by a rigid insistence on compliance with the law.

[Endorsed]: No. 81. (Title of Court and Cause.) U. S. Exhibit #13. Filed Sept. 23, 1912. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [245]

**[U. S. Exhibit No. 14—Letter, April 21, 1911,  
Findlay to Collector, etc.]**

Copied-2-HES. May 31/11.

Honolulu, T. H., April 21st, 1911.

E. R. Stackable, Esq.,

Collector of Customs.

Sir: I beg to state that I have finished discharge, and the Harbor Master has requested me to remove my steamer from the Railroad wharf where she is now lying.

Will you kindly grant me permission to take my steamer outside the Harbor, to be anchored there until I obtain my clearance papers.

I am, Sir,

Yours respectfully,

(Sgd.) JAMES FINDLAY,

Master, British Steamer "Orteric."

THEO. H. DAVIES & CO., LTD.,

(Sgd.) W. H. BAIRD,

Treasurer,

Agents. [246]

6146.

GPT.

Honolulu, Hawaii, April 21, 1911.

Captain J. F. Findlay,

Master, Br. S. S. Orteric,

Honolulu, Hawaii.

Sir: Receipt is acknowledged of your letter of even date making application to take the Br. S. S. "Orteric" outside to anchor until your clearance papers are obtained. This permission is granted, with the understanding that the vessel is anchored



in what is known as the usual anchorage grounds until your clearance papers are obtained from this office.

Respectfully,

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Collector.

[Endorsed]: No. 81. (Title of Court and Cause.)  
U. S. Exhibit #14. Filed Sep. 23, 1912. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [247]

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[U. S. Exhibit No. 15 —Letter, May 15, 1911, U. S. Attorney to Collector.]

10106.

DEPARTMENT OF JUSTICE.

Office of

UNITED STATES ATTORNEY,

District of Hawaii.

Honolulu, May 15, 1911.

Honorable E. R. STACKABLE,

Collector of Customs,

Honolulu, Hawaii.

SIR: Replying to your letter of April 26, 1911 (#6167) relative to the "ORTERIC" matter, I beg leave to hand you herewith a copy of the report of the grand jury relative thereto. I have not thought it necessary to have the same certified to. I personally know that the copy enclosed you herewith is correct.

Should you, after ascertaining what claims are made by the owners of the vessel, wish any statement from me relative thereto, I shall be pleased to

make the same. I am, I think, very well acquainted with all of the facts in the case, and hold myself at your disposal.

Respectfully,

(Sgd.) ROBT. W. BRECKONS,

United States District Attorney.

[Endorsed]: No. 81. (Title of Court and Cause.)  
U. S. Exhibit #15. Filed Sep. 23, 1912. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [248]

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[U. S. Exhibit No. 16—Letter, June 8, 1911, Holmes, Stanley & Olson to Collector.]

HOLMES, STANLEY & OLSON.

Attorneys-at-Law.

Honolulu, T. H., June 8, 1911.

Hon. E. R. Stackable,

Collector of Customs at Honolulu,

Honolulu, T. H.

Sir:—

In re S. S. "Orteric."

Referring to the matter of the alleged violations of the Passenger Act of 1882 as amended, charged against Captain Findlay, Master of the S. S. "Orteric," in her recent voyage to Hawaii, transporting Spanish and Portuguese immigrants to Hawaii, as set forth in your letter to Captain Findlay under date of April 17, 1911, we beg to state that we regret exceedingly the fact that we have been unable to submit the facts and case on behalf of Captain Findlay before this time. We were delayed until the latter part of May in obtaining the affidavit of Miss



Edith Hyde at present residing at Hilo, Hawaii, who was one of the nurses on the "Orteric" and therefore in a position to give material testimony concerning the charges.

We should have presented our case immediately upon receipt of Miss Hyde's affidavit, in accordance with our assurance to you to that effect, but for the fact that we were advised that Mr. A. J. Campbell, the representative of the Territorial Board of Immigration, who was present at the embarkation of the immigrations and the departure of the "Orteric" from Europe, is expected to arrive in Honolulu returning from Europe on Monday, the 12th day of June, 1911.

One of the charges made against Captain Findlay is that the ventilating devices of the "Orteric" did not conform to the [249] requirements of Section 3 of the Passenger Act. We are credibly informed, however, that proper emigration officers inspected the vessel at her port of clearance and approved of the same after sundry alterations, including the ventilating devices.

Section 3 of the Passenger Act contains a proviso that in case the ventilating apparatus is approved by the emigration officers at the port of clearance, such approval shall suffice to show a compliance with the requirements of the Act in this respect.

We believe that we shall be able to establish that such inspection and approval were had by the testimony of Mr. Campbell.

We therefore request the indulgence of your department for such further time as will enable us to

secure Mr. Campbell's testimony, when we will immediately submit to you our case, which will not be later than Tuesday, the 13th day of June, 1911.

While appreciating your desire to have the matter closed as soon as possible, as you have frequently advised us, and also that we have caused the delay thus far on account of the circumstances related, we trust that you will be able to extend the further time requested.

Respectfully,

(Sgd.) HOLMES, STANLEY & OLSON,  
Counsel for Captain Findlay, Master of S. S.  
"Orteric."

CHO/L.

[Endorsed]: No. 81. (Title of Court and Cause.)  
U. S. Exhibit #16. Filed Sept. 23, 1912. A. E.  
Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy  
Clerk. [250]

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[U. S. Exhibit No. 17—Letter, June 13, 1911, Holmes,  
Stanley & Olson to Collector.]

HOLMES, STANLEY & OLSON,

Attorneys-at-Law.

Honolulu, T. H., June 13, 1911.

Hon. E. R. Stackable,

U. S. Collector of Customs at Honolulu,  
Honolulu, T. H.

Sir:

In re S. S. "Orteric."

By written communication dated June 8, 1911, addressed by us to you, we requested that we be allowed to await the return of A. J. Campbell, Esq.,



the Territorial Board of Immigration representative who was present at the *department* of the "Orteric" from its port of clearance in Europe, in order that we might secure his testimony, to show, as we believed to be possible, that the "Orteric," including its ventilating apparatus, had been approved by the emigration authorities of Portugal at said port of clearance in accordance with the proviso contained in Section 3 of the Passenger Act of 1882 as amended. We stated that we were informed that Mr. Campbell was expected to return on the 12th inst., which would enable us to submit the case on behalf of Captain Findlay not later than to-day.

However, Mr. Campbell did not return yesterday, the 12th of June, 1911, and we are now informed that he will arrive in Honolulu on Friday, June 16, 1911.

Notwithstanding the non-arrival yesterday of Mr. Campbell we now submit for presentation to the Department of Commerce and Labor of the United States, the following:

1. Affidavit of Captain James Findlay, Master of the S. S. "Orteric";
2. Attached to said Affidavit of Captain Findlay, the confirmatory affidavits of Arthur Atkins, Chief Officer of [251] the S. S. "Orteric," and John Hopkins Pugh, ship's doctor of the S. S. "Orteric";
3. Affidavit of said John Hopkins Pugh, ship's doctor of the S. S. "Orteric";
4. Affidavit of Edith Hyde, one of the nurses on the S. S. "Orteric";
5. Copies of notices required by Section 7 of the

Passenger Act of 1882 as amended, in the English, Portuguese and Spanish languages, which were posted according to the above-mentioned affidavits, as required by said Section 7. These copies were obtained by undersigned counsel on board the S. S. "Orteric" from the Captain and Chief Officer thereof.

It will be observed from the affidavit of Captain Findlay that reference is made to a copy of the plans of the S. S. "Orteric" in the possession of Andrew, Weir & Company of London, the owners of the vessel, and specifications attached thereto. We beg to state that we shall endeavor to have these plans and specifications submitted to the Department of Commerce and Labor by Messrs. Andrew Weir & Company, in order that the Department may be the better advised concerning the vessel.

Referring to the testimony that we had expected Mr. Campbell to give, we request that we be permitted to submit a supplemental presentation of facts concerning the alleged violation of Section 3, to wit, insufficient ventilating apparatus, by means of affidavit or affidavits to be secured immediately upon the return of Mr. Campbell.

In order that we may deal with the entire case, we also request to be permitted to submit at the same time a written argument as to the applicability of the evidence presented. [252]

Respectfully,

(Sgd.) HOLMES, STANLEY & OLSON,  
Attorneys for Captain James Findlay, Master of  
S. S. "Orteric."  
CHO/L.



[Endorsed]: No. 81. (Title of Court and Cause.)  
U. S. Exhibit #17. Filed Sep. 23, 1912. A. E.  
Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy  
Clerk. [253]

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[U. S. Exhibit No. 18—Affidavits.]

**Affidavit of Captain James Findlay, Master of  
British Steamship "Orteric."**

United States of America,  
Territory of Hawaii,  
City and County of Honolulu,—ss.

James Findlay, being first duly sworn, deposes and  
says:

That he is the Master of the British Ship  
"Orteric"; that the said steamship was launched in  
December 1910 and that affiant has been her Master  
ever since her launching; that on the 24th day of  
February, 1911, the said steamship left Gibraltar  
with about 1500 Spanish and Portuguese emigrant  
passengers aboard whose destination was Honolulu  
in the Territory of Hawaii; that the said steamship  
had been chartered for the purpose of conveying said  
emigrants to said Honolulu by one A. J. Campbell,  
acting according to the information and belief of  
affiant, on behalf of the Board of Immigration of the  
Territory of Hawaii; that about 550 of said pas-  
sengers were Portuguese and the remainder Spanish;

That on Sunday, the 5th day of March, 1911, a riot  
occurred among the passengers of said steamship, on  
the upper deck thereof, the Portuguese male pas-  
sengers, on the one side, and the Spanish male pas-  
sengers on the other, engaging in a pitched battle;

that the said passengers engaging in said battle were armed variously with knives, clubs, cleavers and pistols; but that before any serious injuries were sustained affiant and his officers by interfering were able to prevent further engagement;

That theretofore, all male passengers upwards of 14 years of age who did not occupy berths with their wives were berthed in the fore part of the said steamship in a compartment divided off from the spaces appropriated to the other passengers by substantial and well secured bulkheads; but after the said riot, the Portuguese male passengers absolutely refused to [254] remain berthed in the same compartment with the Spanish male passengers theretofore occupied as aforesaid by single male passengers, stating that they were in fear of injury and of having their lives taken by said Spanish single male passengers; that in order to maintain discipline and prevent bloodshed, affiant deemed it mandatory to segregate the Portuguese passengers from the Spanish passengers, and therefore affiant removed said Portuguese male single passengers from said compartment in the fore part of said vessel aft; that had the said races not been segregated as aforesaid, affiant believes that serious trouble would have resulted with probable loss of life;

VENTILATION: That on the 21st day of February, 1911, the said steamship was cleared from the port of Oporto in Portugal, preparatory to her departure on said voyage to Hawaii; that on the day preceding, about 10 Portuguese officials, among whom affiant believes were included Portuguese



emigrant officials, carefully inspected the said steamship, being engaged for about two hours in such inspection; that the said steamship was inspected with reference to construction, equipment, food supply, and ventilation, and was approved in all such respects and otherwise by all of said officials;

That affiant believes that the ventilating devices in each compartment occupied by passengers on said trip were equal in capacity and utility to the ventilating specifications set forth in section 3 of the "Passenger Act of 1882" as amended, to wit, two ventilators, each not less than 12 inches in diameter, one in the foreward part of each such [255] compartment and one in the after part thereof, and additional ventilators for each compartment in the proportion of two for each additional 50 passengers in each such compartment, and all ventilators carried at least 6 feet above the uppermost deck of the vessel; as will be more particularly shown by a copy of the plans now in the possession of Andrew Weir & Co. of London, England, the owners of said steamship, and the specifications attached thereto, to be supplied for use in connection with this affidavit;

CLOSETS: That there were sufficient closets in number in proportion to the number of passengers according to the requirements of said Section 3 of said Passenger Act, all enclosed, some of which were located on one side of the upper deck of said steamship and the others on the other side of said upper deck;

FOOD: That while milk for infants and children was served regularly only twice a day, nevertheless

mothers of such infants and children were at all times supplied upon application with condensed milk at other times, and often served at irregular times without application;

HOSPITALS: That the said steamship contained two hospital compartments regularly fitted as hospitals on the upper deck of said steamship, ventilated by large skylights and large portholes, and thoroughly lighted; that on account of the number of passengers, two large compartments aggregating more than 1500 square feet in area, were utilized as hospitals, that said additional, temporary hospitals were located about amidships on the shelter deck; that each of said compartments [256] was fitted with three coaling ports, communicating with the upper deck; that whenever the weather permitted, said coaling ports were kept open in order to ventilate said temporary hospitals; that said coaling ports were each not less than 20 inches square; that said compartments also had a door each opening into the fidley which was at all times open through the upper deck; that said doors were about 6 feet high and 2 feet wide and were kept open at all times, thus affording great quantities of fresh air for said temporary hospitals; that said compartments were also fitted with other ventilators, and were amply provided with ventilating devices;

DISCIPLINE AND CLEANLINESS: That affiant together with the Chief Officer, Arthur Atkins, the ship's doctor, John Hopkins Pugh, and Joachin Costa, a Spanish and Portuguese interpreter, almost, every day, and one or more of said persons, every



day, inspected the said steamship and the said passengers, and warned and directed the said passengers through said interpreter, to keep themselves in a cleanly condition and to stay on the upper deck as much as possible; that they directed said passengers to air their baggage and bedding whenever the weather would permit, but with few exceptions the said passengers refused so to do, stating that they feared their belongings would be stolen; that on account of the great number of passengers, it was impossible for the ship's crew to air said bedding and baggage without the assistance of said passengers; that at all times the said crew was engaged in cleaning the decks and compartments and did all in that respect that could reasonably be done; [257]

That the said steamship arrived off the port of Honolulu early on the morning of the 13th of April, 1911, and breakfast was served on board to said passengers before entering the harbor of Honolulu; that the said passengers were greatly excited in view of the approaching landing and end of the voyage, and after eating as much as they wished threw the remnants of the breakfast served about the floors and decks instead of throwing the same overboard as they had customarily done theretofore, and refused to do any cleaning; that the ship's crew were obliged to prepare the vessel for entry into the harbor, and were unable to cleanse the said vessel, on account of which the said remnants of the said breakfast remained on the floors and decks of said steamship when the customs officials boarded the said steamship; that also the said passengers tore cloth from

many of the mattresses in order to make bags thereof for the purpose of carrying off their belongings, in consequence of which the contents of the said mattresses were strewn together with discarded rubbish theretofore belonging to said passengers, about the said vessel; that the acts aforesaid were done immediately prior to the boarding of the said vessel by the United States Officials, and by direction of the collector of the port, the vessel was left in the same condition in which it was at that time for some days after the docking in said port of the said vessel;

**POSTING OF COPIES OF SECTION 6 OF SAID PASSENGER ACT:** That at the beginning of said voyage copies of said Section 6 were posted, both in the Portuguese and Spanish [258] languages, in all of the companionways and various parts of the vessel, but in the course of the voyage many of them were torn down by the passengers; that such notices were again posted about the vessel about two weeks before her arrival in said Honolulu; that very few of said passengers were able to read;

**PASSENGER MANIFESTS:** That after said riot on board said steamer, the shifting of the passengers in order to segregate the Spanish from the Portuguese, resulted in some confusion, making it impossible for affiant to include in the list of passengers the exact compartments and spaces occupied by them thereafter;

That the said steamship will hereafter be regularly engaged in plying between ports of British Columbia, Puget Sound and the Orient, and affiant expects to continue to act as her Master.

**JAMES FINDLAY.**



Subscribed and sworn to before me this 22d day of April, 1911.

[Seal]

GEO. S. CURRY,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii. [259]

**Affidavit of Arthur Atkins, Chief Officer of British  
Steamship "Orteric."**

United States of America,  
Territory of Hawaii,  
City and County of Honolulu,—ss.

Arthur Atkins, being first duly sworn, deposes and says: That he is, and at all times since the launching of the British Steamship "Orteric" in December, 1910, has been, the Chief Officer of said "Orteric"; that he has read the foregoing affidavit of Captain James Findlay hereto attached, contained in six typewritten pages, and sworn to before George S. Curry, a Notary Public of the First Judicial Circuit of the Territory of Hawaii, on the 22d day of April, 1911, and knows the contents thereof; and that the matters and things therein set forth and the allegations therein made are true; and that he confirms the said affidavit in all respects.

ARTHUR ATKINS.

Subscribed and sworn to before me this 22d day of April, 1911.

[Seal]

CHARLES F. PETERSON,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii.

**Affidavit of John Hopkins Pugh, Ship's Doctor of  
British Steamship "Orteric."**

United States of America,  
Territory of Hawaii,  
City and County of Honolulu,—ss.

John Hopkins Pugh, being first duly sworn, deposes and says: That he is, and at all times since the 15th day of February, 1911, has been, the ship's doctor of the British Steamship "Orteric"; that he has read the foregoing affidavit of Captain James Findlay [260] hereto attached, contained in six typewritten pages and sworn to before George S. Curry, a Notary Public of the First Judicial Circuit of the Territory of Hawaii, on the 22d day of April, 1911, and knows the contents thereof; and that the matters and things therein set forth and the allegations therein made are true; and that he confirms the said affidavit in all respects.

**JOHN HOPKINS PUGH.**

Subscribed and sworn to before me this 22d day of April, 1911.

[Seal]                      CHARLES F. PETERSON,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii. [261]



**Affidavit of John Hopkins Pugh, Ship's Doctor of  
the British Steamship "Orteric."**

United States of America,  
Territory of Hawaii,  
City and County of Honolulu,—ss.

John Hopkins Pugh, being first duly sworn, deposes and says:

That he is, and since the 15th day of February, 1911, has been at all times, the ship's Doctor of the British Steamship "Orteric";

That he studied in the University of Cambridge, England, and received from said University the degree of Bachelor of Arts in 1871; that during the next three years, affiant continuously studied medicine at St. Thomas' Hospital in London, England, and in 1874 became a Licentiate of the Society of Apothecaries of London and was registered as a medical practitioner of the United Kingdom of Great Britain and Ireland; that in 1877 affiant received a diploma in surgery and medicine from the Royal College of Surgeons of England; that from 1874 until 1903 affiant was continuously engaged in the practice of medicine and surgery; that for 15 months in 1904 and 1905 affiant was continuously employed by the Transvaal Government as Surgeon Superintendent of Chinese Immigrants from China to Transvaal, and as such had direct superintendence of all immigrants from China to Transvaal; that since that time affiant has been ship's doctor on immigrant ships to Australia from England, and in 1907 on the British Steamship "Kumeric" which conveyed

about 1150 immigrant passengers from the Island of Madeira to Hawaii;

That affiant directly superintended all of the sanitation and sanitary measures on board the said "Orteric" on the trip from Portugal to Hawaii which ended at Honolulu on the 13th day [262] of April, 1911; and directly attended or superintended the medical attention given all patients aboard said "Orteric" on said trip;

That under the direction of affiant, all compartments and decks were swept not less than twice daily, and were also daily disinfected with powder containing 20% carbolic acid and with *cyllin*, a dry powder, suitable for disinfection, and far more powerful as a disinfectant than chloride of lime; that affiant would not permit the washing of compartments occupied by passengers because in the opinion of affiant and according to the experience of medical men having charge of immigrant vessels carrying similar passengers in large numbers on prolonged voyages, washing of such compartments necessarily results in unavoidable dampness which has been proved to be highly detrimental to the health of the passengers;

That any and all accumulations on the said vessel were rendered physiologically harmless and innocuous by disinfectants; that the sleeping compartments were scraped with shovels every day and swept;

That most of the litter found on board the said "Orteric" upon her arrival at Honolulu, was the result of food and rubbish and the contents of mattresses being thrown or strewn about the deck by the passengers in their excitement and haste to land;



That the temporary or additional hospital quarters used on said trip, were in the opinion of affiant, well suited to that purpose considering the circumstances;

That the mortality on board said vessel during said trip was very largely due to the concealment by parents of ailments of their children and their refusal to submit them to medical treatment;

That while milk was served regularly only twice a day [263] nevertheless condensed milk was served at irregular times throughout each day to the mothers of the children for the use of such children, both upon application and without application, constant inspection was made by affiant, and milk supplied in all cases where it was found necessary; that 48 one-pound tins of condensed milk, on an average, were dispensed amongst the passengers for the use of the children and nursing mothers, each day; that said quantity of condensed milk would provide not less than 24 gallons of liquid milk, a quantity ample for the requirements of the children and nursing mothers;

That the water supply on board said "Orteric" for bathing and washing of said passengers was unlimited, and the usual accommodations for washing existed on said steamer.

JOHN HOPKINS PUGH.

Subscribed and sworn to before me this 22d day of April, 1911.

[Seal]

CHARLES F. PETERSON,

Notary Public, First Judicial Circuit, Territory of Hawaii. [264]

**Affidavit of Edith Hyde.**

United states of America,  
Territory of Hawaii,  
County of *Hawaii*,—ss.

Edith Hyde, being first duly sworn, deposes and says:

That she resides at present at Hilo, Island and Territory of Hawaii;

That she was one of the nurses employed on the British Steamship “Orteric” on a recent trip from Portugal to Hawaii transporting Spanish and Portuguese emigrants to Hawaii, the said Steamship having completed her voyage by her arrival at Honolulu, Territory of Hawaii, on the 13th day of April, 1911;

That she assisted throughout said voyage in caring for the passengers who were ill and for infants; that milk was served twice daily regularly throughout said voyage and at irregular times in addition whenever desired by the mothers of infant children and also whenever it appeared necessary to the hospital staff; that affiant believes that milk in ample quantities was served at all times throughout said voyage;

That the said steamship was equipped with two hospital compartments regularly fitted as hospitals on the upper deck of said steamship; that said hospitals were ventilated by large skylights and port-holes and the lighting thereof was excellent; that temporary hospitals were fitted about amidships on the shelter deck to accommodate passengers who



might become ill in view of the large number of passengers; that said temporary hospitals were well ventilated and at all times were supplied with fresh air;

That about a week out from Gibraltar, a riot occurred [265] on board said steamship, caused by differences between the Portuguese on the one side and the Spanish passengers on the other; that thereafter the Portuguese passengers absolutely refused to remain in the same quarters with the Spanish passengers on account of fear of violence, and therefore the two nationalities were segregated from each other.

EDITH HYDE.

Subscribed and sworn to before me this 18th day of May, 1911.

[Seal]

CARL S. SMITH,

Notary Public, Fourth Circuit, Territory of Hawaii.

[266]

United States' Navigation Laws.

Immigrant Ships.

Section 148. Privacy of Passengers. Neither the officers, seamen, nor other persons employed on any such steamship or other vessel shall visit or frequent any part of the vessel provided or assigned to the use of such passengers, except by the direction or permission of the Master of such vessel first made or given for such purpose; and every officer, seaman, or other person, employed on board of such vessel who shall violate the provisions of this section, shall be deemed guilty of misdemeanor, and may be fined not exceeding 100 dollars, and be imprisoned not exceeding 20 days, for each violation; and the Master

of such vessel who directs or permits any officer, seaman, or other person employed on board the vessel to visit or frequent any part of the vessel provided for or assigned to the use of such passengers, or the compartments or spaces occupied by such passengers, except for the purpose of doing or performing some necessary act or duty as an officer, seaman, or other person employed on board of the vessel, shall be deemed guilty of a misdemeanor, and may be fined not more than 100 dollars for each time he directs or permits the provisions of this section to be violated. A copy of this section, written or printed in the language or principal languages of the passengers on board, shall, by or under the direction of the Master of the vessel, be posted in a conspicuous place on the forecastle, and in the several parts of the vessel provided and assigned for the use of such passengers, and in each compartment or space occupied by such passengers, and the same shall be kept so posted during the voyage; and if the said Master neglects so to do, he shall be deemed guilty of a misdemeanor, and shall be fined not more than 100 dollars. [267]

[Endorsed]: No. 81. (Title of Court and Cause.)  
U. S. Exhibit #18. Filed Sep. 23, 1912. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [268]



[U. S. Exhibit No. 19—Letter, April 24, 1911,  
Collector to Secretary of Commerce and Labor.]

No. 9911.

LED.

Honolulu, Hawaii, April 24, 1911.

The Honorable,

The Secretary of Commerce and Labor,

Bureau of Navigation,

Washington, D. C.

Sir:—

I have the honor to confirm my cablegram of the 22nd instant which reads as follows: "Secretary Commerce, Labor, Washington—Agents British *steam* Orteric make application clear under bond covering alleged penalties amounting approximately ten thousand dollars passenger act 1882. Recommend favorable consideration. Customs."

This cablegram was sent at the request and expense of Messrs. Theo. H. Davies & Co., Ltd., agents of the above named vessel.

Respectfully,

(Sgd.) E. R. STACKABLE,

Collector.

Copy /HES.

[Endorsed]: No. 81. (Title of Court and Cause.)  
U. S. Exhibit #19. Filed Sep. 23, 1912. A. E.  
Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy  
Clerk. [269]

[U. S. Exhibit No. 20 — Letter, April 22, 1911,  
Hogan to Secretary of Commerce and Labor.]

BAKER, SHEEHY & HOGAN,  
Attorneys & Counsellors at Law.  
Evans Building,  
Washington, D. C.

April 22, 1911.

The Secretary of Commerce and Labor,  
Washington, D. C.

Sir:—Under date of the 21st instant, Andrew Weir and Company, 6 Lloyds Avenue, London, England, owners of the “eric” steamers, addressed to me their Washington representative, a cablegram of which the following is a translation:

“The American Immigration Board at Honolulu is holding up the new steamer ORTERIC on account of an alleged breach of passengers act; the steamer and all store approved Campbell Board’s representatives; single passengers from Portugal, Spain, rioted and the captain had to keep separate to save the situation. Now the Honolulu officials are giving trouble; a cargo is waiting at Seattle for this steamer, and unless it is promptly released at Honolulu, a very serious situation will result; please present the matter to the Immigration authorities at Washington and request their usual prompt attention.”

The reference from the foregoing to the Immigration Board at Honolulu is accounted for by the failure of my English principals to understand that the



matter in question comes under the jurisdiction of the Collector of Customs.

The detention of the ORTERIC at Honolulu for any considerable time will doubtless result in great loss. We have cabled for details, but readily understand that unless you are officially informed it would be necessary, after we are in a position to present details to you that you seek an official report before you would be in a position to act in this matter.  
[270]

In view of this, and of the patent importance of minimizing delay, I respectfully request that the Department instruct the Collector of Customs at Honolulu by cable, to report by cable the cause of the ORTERIC'S detention with such details as may be necessary to enable the Department to act on the owners' request, which request is this:

That the ORTERIC be permitted to proceed on her voyage upon her master or Honolulu agent entering into bond for making good of any penalty found to be due either by the vessel or the master; and that upon the coming in of a formal report of the matter the questions involved be then adjudicated after a hearing.

Yours very respectfully,

(Sgd.) FRANK J. HOGAN.

[Endorsed]: No. 81. (Title of Court and Cause.)  
U. S. Exhibit #20. Filed Jan. 20, 1913. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [271]

[U. S. Exhibit No. 21—Letter, June 17, 1911, Hogan to Commissioner of Navigation.]

BAKER, SHEEHY & HOGAN,  
Attorneys & Counsellors at Law.  
Evans Building,  
Washington, D. C.

June 17, 1911.

Commissioner of Navigation,  
Department of Commerce and Labor,  
Washington, D. C.

Sir: In re charges of violations of passenger act by steamer ORTERIC, at Honolulu:

Confirming my visit to your office this morning and your direction that a report be called for on the above subject, this letter is written that it may be put on your file of the case as a reminder of my request to be informed whenever report relative to the alleged violation by the steamship ORTERIC of certain sections of the passenger act, charges respecting which were made at Honolulu by the Collector of Customs on April 17, 1911, is received at your office.

Yours, very respectfully,

(Sgd.) FRANK J. HOGAN,  
Attorney for Frank Waterhouse & Co., Inc.

[Endorsed]: No. 81. (Title of Court and Cause.)  
U. S. Exhibit #21. Filed Jan. 20, 1913. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [272]



[U. S. Exhibit No. 22—Letter, Undated, Baker,  
Sheehy & Hogan to Cable.]

COPY.

BAKER, SHEEHY & HOGAN,  
Attorneys & Counsellors at Law.

Evans Building,  
Washington, D. C.

Hon. Benjamin S. Cable,  
Acting Secretary, Department of Commerce and  
Labor,  
Washington, D. C.

Sir: Referring to your letter of the 30th ultimo, addressed to our Mr. Hogan, advising that the Department has now received report of the Collector of Customs at Honolulu, in regard to penalties aggregating \$7,960., incurred by the British steamer ORTERIC for violation of sections 2, 3, 5, 6, and 9 of the Passenger Act of 1882, we have the honor to inform you that Mr. Hogan is absent from Washington, and your communication was forwarded to him in view of the fact that the matter referred to is in his personal charge.

Mr. Hogan requests us to advise you that his return here is expected in the week of the 24th instant. If the matter of the ORTERIC can be permitted to await his return, we would be greatly obliged. If, however, it must be disposed of prior to that time, we will forward the papers to Mr. Hogan in order that he may send to you, in writing, the points which he desires the Department to consider. We are sure

that he would prefer to supplement any written brief of his contentions by a verbal presentation, and we trust that the Department may be able to permit the matter to await his return.

Yours, very respectfully,

BAKER, SHEEHY & HOGAN.

By J. C. SHEEHY.

[Endorsed]: No. 81. (Title of Court and Cause.)  
U. S. Exhibit #22. Filed Jan. 20, 1913. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [273]

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**[Certificate of Clerk U. S. District Court to  
Transcript of Record.]**

*In the District Court of the United States in and for  
the District and Territory of Hawaii.*

United States of America,  
District of Hawaii,—ss.

I, A. E. Murphy, Clerk of the District Court of the United States for the District of Hawaii, do hereby certify that the foregoing pages, numbered from 1 to 274, inclusive, are a true and complete transcript of the record and proceedings had in said Court in the cause of The United States of America vs. James F. Findlay, T. Clive Davies and W. H. Baird, as the same remains of record and on file in my office, and I do further certify that I hereto annex the original Writ of Error and Citation on Appeal in said cause.

I further certify that the cost of the foregoing transcript of record is \$64.00, and that said amount has been paid to me by the appellants.



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 27th day of October, A. D. 1914.

[Seal] A. E. MURPHY,  
Clerk, United States District Court, Territory of  
Hawaii. [274]

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[Endorsed]: No. 2511. United States Circuit Court of Appeals for the Ninth Circuit. James F. Findlay, T. Clive Davies and W. H. Baird, Plaintiffs in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Territory of Hawaii.

Received and filed November 4, 1914.

FRANK D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.

**United States**  
**Circuit Court of Appeals**

**For the Ninth Circuit.**

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**JAS. F. FINDLAY, T. CLIVE DAVIES and W.  
H. BAIRD,**

**Plaintiffs in Error,**

**vs.**

**UNITED STATES OF AMERICA,**

**Defendant in Error.**

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**BRIEF FOR PLAINTIFFS IN ERROR**

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**Upon Writ of Error to the United States District Court of  
the Territory of Hawaii.**

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**HENRY HOLMES,  
WILLIAM L. STANLEY,  
CLARENCE H. OLSON,**  
**Attorneys for Plaintiffs in Error.**

**Filed**

**FEB 15 1915**





No. 2511

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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JAS. F. FINDLAY, T. CLIVE DAVIES and W.  
H. BAIRD,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

---

Upon Writ of Error to the United States District Court  
of the Territory.

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## BRIEF FOR PLAINTIFFS IN ERROR

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This case comes to this court upon writ of error to the United States District Court of the Territory of Hawaii. Suit was brought by the United States of America, defendant in error, against plaintiffs in error, above named, to recover Seventy-nine Hundred and Sixty (\$7960.00) Dollars on a bond of the plaintiff in error, Findlay, master of the British ship "ORTERIC," as principal and the plaintiffs in error, Davies and Baird, as sureties.



The bond in question was executed, after Findlay, the master of the *Orteric*, had been notified by the Collector of Customs of the port of Honolulu that penalties aggregating Seventy-nine Hundred and Sixty (\$7960.00) Dollars had been incurred by him for alleged violations of the "Passenger Act of 1882" and as amended, "to insure the payment of such penalties for such violations aforesaid as shall be determined by the Department of Commerce and Labor to have been incurred by the said master after the presentation, within a reasonable time, by the said master, or his agents or attorneys, and the officials of the United States at said Honolulu, of the facts to said Department"

and was conditioned upon the "payment to the United States through the Collector of Customs at the port of Honolulu of the amount which the Department of Commerce and Labor of the United States shall, upon such presentation of facts, determine that the said principal is liable for on account of such penalties so alleged to have been incurred."

By stipulation, the case was submitted to the court—jury waived.

The evidence disclosed that on April 17, 1911, soon after the arrival of the *S. S. ORTERIC* in Honolulu, the master was given a written notice by the Collector of Customs that penalties aggregating to Seventy-nine Hundred and Sixty (\$7960.00) Dollars had been incurred by him for alleged violations of the Passenger Act of 1882; the notice setting out

that the following sections of the Passenger Act had been violated and the penalties incurred :

“Sec. 2, relating to berth: penalty \$5.00 for each passenger.

“Sec. 3, light and ventilation: penalty \$250.00.

“Sec. 4, food: misdemeanor punishable by fine of \$500.00.

“Sec. 5, physician and hospital: penalty \$250.00.

“Sec. 6, discipline and cleanliness: penalty \$250.00.

“Sec. 7, posting notice that ship's company cannot visit steerage quarters: penalty \$100.00.

“Sec. 9, passenger manifests: penalty fine not to exceed \$1,000.00.”

The notice further called the master's attention to Section 13 of the Act making such penalties, etc., a lien upon the vessel.

Thereafter, at the request of Theo. H. Davies & Company, Limited, the collector cabled to the Secretary of Commerce and Labor for permission to grant clearance upon a satisfactory bond being furnished for the payment of any penalties which might be imposed. The Acting Secretary replied granting his approval. The bond (Ex. 1) involved in this suit was given.

Thereafter there was submitted by Holmes, Stanley and Olson, on behalf of the master for presentation to the Department of Commerce and Labor, the following documents :

Affidavit of Captain Jas. Findlay, master of the  
S. S. ORTERIC, and attached thereto

Confirmatory affidavits of Arthur Atkins, Chief  
Officer, and of John Hopkins Pugh, Ship's  
Doctor ;



Affidavit of John Hopkins Pugh;

Affidavit of Edith Hyde, one of the nurses on the Orteric;

Copies of notices required by Section 7 of the Passenger Act of 1882, as amended, in the English, Portuguese and Spanish languages, which were posted on the Orteric.

The affidavit of the master sets forth that on the 24th day of February, 1911, the S. S. ORTERIC left Gibraltar for Honolulu with about 1,500 emigrants, of which 550 were Portuguese and the rest Spaniards; that on the 5th day of March, 1911, a pitched battle occurred between the Spanish male passengers on one side and the Portuguese on the other; that theretofore all single male passengers were berthed in a compartment divided off from the other passengers by well secured bulkheads, but that after said riot, the Portuguese male passengers absolutely refused to remain berthed with the Spanish passengers, stating that they were in fear of having their lives taken by the Spanish male passengers; that to prevent bloodshed and loss of lives, affiant deemed it mandatory to segregate the Portuguese passengers from the Spanish and therefore removed the Portuguese male single passengers aft;

Ventilation: that the vessel had been inspected and approved by the Portuguese authorities; that affiant believed that the ventilating devices in each compartment were equal in capacity to the specifications set forth in Section 3 of the Passenger Act and

reference was made to the plans which were to be obtained from the London owners of the vessel ;

Closets: that the closets were sufficient in number according to the regulation of Section 3 and were all enclosed, and were located on the upper deck.

Milk was served twice a day and at all times was supplied upon application to the mothers of infants and to children ;

Hospitals: that the vessel contained two hospital compartments on the upper deck regularly fitted and ventilated and lighted by large skylights and port-holes ; and additional temporary hospitals more than 1500 square feet in area were located on the shelter deck, whose ventilation and lighting were described ;

Discipline and Cleanliness: the master shows that the unsightly condition of the ship, when the Custom officers boarded it, was due to the excitement among the passengers upon arriving at their destination which caused them to throw the remains of breakfast about the decks, tear up mattresses for bags to hold their belongings and to refuse to clean up as usual ; that the failure to air belongings and bedding during the voyage was due to the refusal of the passengers who stated that their belongings would be stolen ;

That at the beginning of the voyage copies in Spanish and Portuguese of Section 6 of the Passenger Act were posted in all the companionways and in various parts of the vessel ; that some were torn down during the voyage but were again posted two weeks before the arrival of the vessel ;



That the confusion in the manifest resulted from the shifting of the passengers after the riot.

The affidavit of the first officer and of the ship's doctor confirmed the statements of the master in all respects.

The affidavit of John Hopkins Pugh, the ship's doctor, showed his education and training and wide experience as ship's doctor on various immigrant ships. Affiant declares that he directly superintended all of the sanitation and sanitary measures on board the Orteric and the medical attention of all patients aboard; that under his direction all compartments and decks were swept not less than twice daily and were also disinfected with a dry powder; that he would not permit the washing of compartments occupied by passengers because, according to his opinion and the experience of medical men in such circumstances, the dampness which necessarily results, has been proved to be highly detrimental to the health of the passengers; that the sleeping compartments were scraped and swept every day. The doctor also states that the litter found aboard at Honolulu was the result of food and rubbish and the contents of mattresses being thrown about the deck by the passengers in their haste to land; that the mortality among the children was largely due to the concealment by the parents of the ailments of their children. He also supports the statement of the master concerning the milk supply and the hospital equipment. Further, he states that the water for bathing was unlim-

ited and that the usual accommodations for washing existed.

The affidavit of Edith Hyde, one of the nurses aboard the Orteric, contains in substance the assertions made by the master concerning the hospitals, the supply of milk to mothers and to infants and the riot between Portuguese and Spanish passengers.

The Collector of Customs forwarded these affidavits and the copies of the posted notices to the Secretary of Commerce and Labor and also, in addition to the bond and cablegram referred to above, a report of the inspectors of the vessel, a copy of a letter from the Portuguese Consul, addressed to the Governor of Hawaii, containing a discussion of the deaths among the children aboard the Orteric and the lack of sanitary precautions aboard said vessel, several letters between the Collector and the District Attorney, an extract from a purported report of the Grand Jury relative to the S. S. Orteric, which extract states in substance that it, the Grand Jury, was requested by the Collector of Customs and the United States District Attorney to make a report relative to conditions on board the Orteric in order that the proper department at Washington, in inflicting the fines and penalties, if any should be inflicted, should have the benefit of the Grand Jury's investigation. The report discusses the alleged violation of the Passenger Act relating to the segregation of the sexes; it also stated that the law relative to ventilation was not complied with, that the hospitals were unfit for the purposes for which they were provided, that the pro-



visions of the act relating to cleanliness had been violated in a manner which could not be too strongly condemned, and the opinion concludes with the statement that, on the whole, with the evidence before it, the Grand Jury would probably have returned an indictment had it not been for the action of the owners in submitting the fact to the Department of Commerce and Labor for its determination. In addition to the above mentioned document several letters from Holmes, Stanley and Olson, attorneys for the master of the Orteric, dealing with the presentation of the facts to the department, and several letters from Messrs. Baker, Sheehy and Hogan, a Washington firm of attorneys, to the Secretary of Commerce and Labor, were before the secretary.

On December 4, 1911, the Acting Secretary of Commerce and Labor sent a letter to the Collector of Customs in Honolulu, reviewing the report of the Grand Jury, and stated that "in the opinion of the department, penalties aggregating \$7960.00 were incurred in this case for violation of the sections enumerated and it declines to interfere in behalf of the offenders."

Thereupon suit was instituted upon the bond, the complaint reciting the execution of the bond, the condition of the bond and

"that thereafter \* \* \* the Department of Commerce and Labor, through the secretary thereof, did determine that the said James F. Findlay was liable to the United States of America on account of certain penalties \* \* \* and did on the 4th day of

December, A. D. 1911, determine that said liability, on account of said violation, did amount to the sum of \$7960.00”;

And that notice of the determination was given to the defendants and demand for payment made upon them, but that they refused to pay the same.

The court decided “that the bond could not be sustained on its face” (page 28), but after the case was reopened and additional evidence consisting of the Grand Jury’s report, the letters, etc., above referred to, had been introduced, the court found that the bond did not contemplate an arbitration of any controversy;

“That the parties did not intend a submission of facts with the object of a determination of the master’s guilt or innocence of the law’s violation—an arbitration—but that the parties had in view a submission of facts with the object of a remission of the penalties to which the actual violation of the law had made the master confessedly liable” (page 31).

After the court had made its findings and before the entry of judgment, a motion in arrest of judgment going to the sufficiency of the declaration was made. The overruling of this motion is assigned as error.

On June 17, 1913, the court gave judgment for the plaintiff for the sum of \$7960.00 penalties, and interest thereon from the date of the secretary’s notice, and costs, a total of \$8960.30. The entry of this judgment was duly excepted to and is urged as error.



## ERRORS RELIED UPON.

Upon the trial, the plaintiffs in error objected to the introduction of the above-mentioned evidence consisting of the extract from the Grand Jury's report, the copy of the report of the inspectors from the collector's office, and the various letters dealing with the sanitary condition of the Orteric, on the grounds that such letters, reports, etc., were hearsay and represented in many cases the opinion of the declarants as to the guilt of the accused, and were in no way binding on the defendants, plaintiffs in error. The objections were overruled and exceptions duly noted. The admission of this evidence is now urged as grounds for a reversal of the judgment.

## ERRORS I TO XI Inclusive (pp. 53-59).

The trial court, in its decision, found that there had been a submission to the Secretary of Commerce and Labor for the purpose of obtaining remission of penalties which the master of the Orteric had admittedly incurred. This finding is claimed to be erroneous.

## ERRORS XII, XIII, XVI and XVII (pp. 59-60).

The trial court found that the bond sued upon was not a contract to submit to the Secretary of Commerce and Labor the question of whether or not any liability had been incurred by the master and vessel and the extent of such liability, if any. This finding is claimed to be erroneous.

**ERROR XVIII (p. 60).**

The trial court found that the vessel and its master were estopped to deny that an application had been made to the Secretary of Commerce and Labor for the remission of penalties incurred. This finding is claimed to be erroneous.

**ERROR XIV (p. 14).**

Upon motion in arrest of judgment made by the plaintiffs in error in the court below, the trial court held that the complaint stated a sufficient cause of action. This ruling is claimed to be erroneous.

**ERRORS XXI and XXII (p. 60).**

The trial court admitted the evidence heretofore referred to over the objections of the plaintiffs in error, on the ground that the bond sued upon was ambiguous and required explanation. It is claimed by the plaintiffs in error that the bond is unambiguous and therefore that this ruling was erroneous.

**ERROR XXIV (p. 61).**

It is contended by the plaintiffs in error that the trial court erred in finding in favor of the defendant in error and in entering judgment for the defendant in error against the plaintiffs in error.

**ERRORS XXIII, XXIV and XXV (pp. 60-61).****ARGUMENT.**

The defendants plaintiffs in error contended below, and now contend, that the bond was not binding because:

I. No authority is granted to the Collector of Customs whereby he can legally impose fines and



penalties for alleged violation of the Passenger Act of 1882.

II. That any attempt to withhold the issuance of clearance papers till such alleged fines or penalties were paid or secured was illegal and *ultra vires*.

III. That a bond given on the certainty that clearance papers would not be issued otherwise, is given involuntarily under duress and is without consideration.

IV. That the Secretary of Commerce and Labor cannot legally determine the amount of fines and penalties incurred by the master.

V. That the Secretary has not judicially determined the amount of such fines and penalties.

VI. That the so-called decision of the Secretary of Commerce and Labor cannot be binding as an arbitration, or award or a compromise of a disputed claim since the Collector of Customs had no authority to enter into a submission on behalf of the government.

That no authority is granted to the Collector of Customs or to the Department of Commerce and Labor to determine the amount of fines and penalties incurred by alleged violations of the Passenger Act of 1882, as amended, is obvious. An examination of the statute shows that the various sections provide for fines, penalties and, in some cases, imprisonment. Though the penalties and fines may be recovered in a civil proceeding, to wit: in an action of debt, they are penal in nature. The recovery in an action of debt is based upon the old contract

theory of the formation of the state and its government, upon the theory that the individuals contracted to submit to the penalties that might be imposed by the state. The result of this implied contract was that upon the imposition of the penalty by the state, a debt arose. The action is penal in its nature rather than civil; that is, it is the imposition of a penalty rather than a recovery of damages. A penalty or fine, the name it is called by, is immaterial; the object is penal—punishment rather than damages.

Though it might be

“within the competency of Congress to provide for the imposition of penalties by an executive officer, and the enforcement is not necessarily governed by rules concerning the prosecution of criminal offenses”

as decided by the case of *Oceanic Steamship Company vs. Stranahan*, 214 U. S. 321, in the absence of any such provision by Congress and in the presence of a general provision for recovering penalties, the general method must be employed, which is by suit. It might be legal for Congress to give the power to the Collector of Customs or to the Secretary of Commerce and Labor or to both of them, to impose and collect the penalties provided in the Act, yet this Act gives them no such authority and we contend that no penalty can be imposed until there has been a judicial determination of liability either in a criminal or civil proceeding. When fines and penalties are provided for in some case having a wide range be-



tween the maximum and minimum penalties and no method or machinery is especially provided for their determination, imposition and collection except Section 13, which says :

“a vessel shall be liable and may be libelled therefor in any Circuit or District Court”

it cannot be urged that the Collector of Customs or the Secretary of Commerce and Labor can determine the liability and the amount of such fines and refuse to issue clearance till this amount is paid or secured by a contract entered into to pay such amounts as the Secretary, reviewing the evidence, may determine. *Oceanic Steamship Company vs. Stranahan*, supra, is to the effect that :

“Money paid to a Collector on the certainty that clearance papers will not be issued, is paid involuntarily and if unlawfully exacted can be recovered.”

As pointed out in the decision of the trial court, if the Collector of Customs or the Secretary of Commerce and Labor cannot determine and enforce the collection of the amount of penalties, exacting a bond cannot give them this authority. He cannot do indirectly what he cannot do directly. If he could do so, under this reasoning, the judicial power could be transferred by the executive officials to themselves by merely exacting a bond whereby the accused agrees to pay such penalties as they might determine. Whether the penalties can be recovered in debt or in a proceeding, after an indictment, or

whether they can be determined in an action in admiralty by a proceeding against the vessel, most clearly there is no provision whereby the Collector or the Secretary of Commerce and Labor can impose or collect them. Where no form of recovery of the penalties is provided, the recovery must be in the District Court in action of debt, and further in the action, the master is entitled to a Jury trial, under the seventh amendment of the Constitution, though there might be a proceeding in admiralty against the vessel and the liability be the same.

*The Queen*, 4 Ben. 237, Federal Case No. 16107.

We think it does not need much argument to show that there has never been a legal determination of liability of the master or sureties in this case. The notice of the Collector of Customs that the master had incurred such penalties was not such a determination since the Collector of Customs had no authority to impose or determine the amount of penalties, if any had been incurred. Nor was the decision of the Acting Secretary of Commerce and Labor to the effect that:

“In the opinion of the Department, penalties aggregating \$7960.00 had been incurred in this case and that it declined to intervene in behalf of the offenders”

a determination of liability unless the bond gave the Secretary the power to determine the amount of the defendants' liability. If the bond did give the Secretary this authority, it could only be on the ground that the matter in controversy had been submitted



on behalf of the government and on behalf of the defendant and an award or compromise made pursuant to such submission. As pointed out in several cases cited in the decision of the trial judge (an especially good one is the case of *U. S. vs. Ames*, 1 Wood and M. 76), no officer of the United States has authority to enter into a submission on behalf of the government. In that case when the defendant in an action for overflowing land belonging to the United States pleaded a submission of the matter in controversy by the District Attorney on behalf of the government and an award pursuant thereto, the court held the award not binding on the United States.

“The objection to the validity of the award is in my view decisive that there is a want of authority in an officer of the United States to enter into a submission in their behalf which shall be binding. All judicial power is by the Constitution vested in the Supreme Court and such inferior courts as Congress may from time to time ordain and establish. Const., Art. 3-1. No department or officer has a right to vest any of it elsewhere; and it has been questioned even if Congress can vest it in any tribunal not organized by itself. (1 Wheat, 304, 330, 336, and authorities cited in the case of the British prisoners. 1 Wood. and Minot 70.) It is our duty to take notice that no Act of Congress has granted any authority to any arbitrators in cases like this; and hence though the former District Attorney speaks in the award as if authorized to submit this case, he doubtless means that he was ‘authorized’ by the solicitor of the treasury or war department to do so and not by any special law. As we are bound to know that neither he nor they were authorized by any law for that purpose, it follows that any arrangement by the solicitor of the treasury or by the war department or

by the District Attorney to refer such a claim is not binding. (*U. S. vs. Nicell*, Paine 646.) Such submissions and awards are sometimes useful, as they may be afterwards accepted and voluntarily enforced by the proper authorities as a guide as to what is supposed to be nearly right and safe; but I can see no *legal ground* on which their execution can be compelled by a court of law. The case of the disputed title to the pea patch in the Delaware Bay, is familiar to many of us, where a most inconvenient delay has occurred, in authorizing a reference of the dispute by a special Act of Congress, it being conceded that no authority already existed for making such a reference."

*U. S. vs. Ames*, supra.

It is elementary that if parties enter into a submission concerning a subject matter over which one of the parties had no authority an award is a nullity.

*Wyat vs. Benner*, 23 Barb. 327.

An award to be good must be mutual in the sense that it will be a discharge of all future claim by the party in whose favor the award is made.

*Pinion vs. Delavan*, 1 Caines 304.

An arbitration and award that include one party only is an anomaly in the law.

*Gordon vs. U. S.*, 7 Wall. 188.

We think it is clear that Collector of Customs or the Secretary of Commerce and Labor had no authority to collect any fines or penalties that the master may have rendered himself liable to; no more so than they could determine the term of imprisonment that he may have rendered himself liable to. They could not by receiving a cash payment, compromise the claim whether the amount was arrived at by way



of an award of an arbitrator or the amount was arrived at by way of compromise between the parties. Can the Collector, not being able to compromise or submit the question directly, do the same thing by means of a bond?

This cannot be considered a compromise of a disputed claim. It is now provided by statute that upon a report by the District Attorney or any special attorney or agent having charge of any claim in favor of the United States showing in detail the condition of such claim and the terms upon which it can be compromised and recommending that it be compromised upon the terms so offered and upon the recommendation of the solicitor of the treasury, the secretary of the treasury is authorized to compromise such claim accordingly. This statute, however, must be complied with before any compromise can be regarded as legal. Thus in *U. S. vs. George*, 6 Blatchf. 406, Fed. Case 15,198, where the terms agreed upon by the secretary were never reported or recommended by the District Attorney, the action of the secretary was held of no effect as a legal compromise. See also *Grey Jacket*, 5 Wall. 369. Clearly the collector of Customs is an official to collect information concerning vessels and not one to impose such fines and penalties. Harmon, in 21 Op. Atty. Gen. 361, holds that the comptroller is not a special attorney or agent that can recommend a compromise; he "does not have charge in the same sense that a district or special attorney or agent has, viz., for the express purpose of directly enforcing them."

The trial court, recognizing the soundness of the contention that there could be no "submission of fact with the object of the determination of the master's guilt or innocence of the law's violation," in a labored conclusion stated that the parties did not have in mind what the bond stated, that is, a determination of the alleged violations and what the declaration stated, to-wit, that the Department of Commerce and Labor did determine that the master was liable on account of certain penalties, but that the parties had in view "a submission of fact with the object of a remission of the penalties to which the actual violation of the law had made the master confessedly liable."

Three objections, each equally decisive, can be made to this finding. The first is, that all the evidence, the wording of the bond and the complaint itself show that there was an attempt and an intent to submit the question of liability for "alleged" violations of the law to the determination of the Secretary of Commerce and Labor; the second, there is no evidence showing that the master ever admitted his guilt or violation of the law to the extent found or to any extent, but on the contrary strenuously denied the same and submitted evidence to sustain his claim of innocence; the third is that even though the master admitted his violation of the law and applied for the remission of the penalties, still this would give no authority to the Secretary to determine the amount of the penalties, but upon the Secretary's "refusal to interfere," the master's guilt and the extent of his



punishment would have to be determined in a court of law in which his admissions might be evidence. Admitting for the sake of argument that the Secretary of Commerce and Labor, having power to remit penalties, may "in order to prevent the wrong-doers playing fast and loose with him exact a bond as an assurance of good faith and to secure in case of denial of remission full satisfaction of the penalty incurred by him," yet he could not exact a bond giving himself the power to determine the amount of this penalty in case he refused a remission. It might well be that the Secretary would have power to exact a bond whereby the accused would be bound to pay such penalties as might be found in a proper tribunal to have been incurred in case the Secretary refused remission, but the penalties incurred and the amount of liability therefor could only be determined by a court. This phase of the question will appear more clearly under the discussion of "common law bond."

It is impossible to see how the court found that there was an admission of guilt in the present case, a fundamental premise to the court's decision. Taking all the so-called evidence (the admissibility of much of this will be discussed hereafter), there is no showing that the master admitted his guilt, but on the contrary the affidavit of the master and the officers tended to show, at least attempted to show, that the law had not been violated. For example, in his affidavit the master claimed that the construction of the closets complied with the law; that the construc-

tion of the hospital, its ventilation, etc., complied with the law; that the food and milk supply was ample and complied with the law; that the ship was kept in a sanitary condition, being swept twice a day, and that all sleeping compartments were swept and scraped every day and disinfected with dry powder; that the sleeping compartments were not washed because the doctor ordered the dry cleaning; that the large number of deaths among the infants was largely due to the concealment of the children's ailments by their mothers and not to conditions on board the vessel. Further, the evidence submitted by the master regarding alleged violations of Sections 6 and 7 of the Passenger Act shows that notices were posted but some of them were torn down by the passengers and that they were again posted. If there was no negligence on the part of the master in keeping the notices posted, there would be no liability under this section. Certainly the evidence of the master tended to show that he had exercised due diligence in this matter. He further claimed that the removal of the male Portuguese passengers from the compartment set aside for single males was rendered necessary for the purpose of preventing bloodshed and saving life. This claim was not in mitigation of the offence, but was by way of defense, and certainly the master thought that the provision requiring the separation of sexes was not an absolute one, but that the necessity of saving life would be a defense.

Thus in the case of *Charles Nelson*, 149 Fed. 846,



which holds that a steamship which left San Francisco a few days after the earthquake was not subject to the penalty prescribed by the Revised Statutes, Section 4465, for carrying more steerage passengers than the number allotted by her inspection certificate, and was not liable to the passengers in damages for the inconvenience of the overcrowding and the shortage of water where the excess was due to the confusion caused by the destruction of the city and the shortage of water was due to the company's inability to procure water or sufficient coal for its condenser in San Francisco and the bad weather which prolonged the voyage.

See also the *Geneva* 26 Fed. 647, which decides that where the excess of passengers is due to intruders, there is no liability for violating this section. See also *Beck vs. Johnson*, 169 Fed. 154.

Other evidence in the case, such as a letter from Davies & Company, which as a statement of the ship's agent might be considered admissible, shows clearly that the Secretary of Commerce and Labor was to determine the question of alleged violations.

#### EXHIBIT VII, pp. 118-119.

The contention was made in the court below that "even though the Secretary of Commerce and Labor should not have the right under the law to determine the liability of the vessel, yet there is no principle of law which would prevent the parties from agreeing to be bound by his decision relative thereto. A decision of a private person on a disputed fact between

two other individuals has no effect whatever as to these individuals when given without their consent or without any law authorizing such a decision. Such a decision, however, becomes binding when the two individuals have agreed that it shall be binding."

The court in its decision, after denying the validity of the bond as a common law bond, then turns about and decides that the bond is good as a common law bond; that is, the power to exact it is an incident of the Secretary's power to remit. This calls for some consideration of the principles governing so-called common law bonds. There are many decisions regarding the liability of obligors on bonds to the government where the bond does not conform to the statute or is not expressly provided for by statute. A brief discussion of the cases most favorable to the view of the government will suffice.

The two leading cases which are cited in all subsequent cases are *United States vs. Tingey*, 5 Pet. 115, and *United States vs. Bradley*, 10 Pet. 358. While the actual decision in *United States vs. Tingey* is to the effect that a bond with a consideration different from that prescribed by law required by the Secretary of the Navy of a purser in the navy as a condition of his holding his office was extorted under color of office and was invalid, the oft-quoted dictum is to the effect that the United States, being a body politic, as an incident to their general right of sovereignty have a capacity to enter into contracts and take bonds in cases within the sphere of their constitutional powers: through the instrumentality of the



proper department to which those powers are confined and appropiate to the just exercise of those powers, although the making of such contracts have not been prescribed by any legislative act. The court laid this down as a general principle only, without (as it was then said) attempting to enumerate the limitations and exceptions which may arise from the disbursements of powers in our government; and from the operation of other provisions in our Constitution and laws.

The court further stated:

“We hold that a voluntary bond taken by authority of the proper officers of the treasury department, to whom the disbursement of public moneys is intrusted to secure the fidelity in official duties of a receiver, or an agent for the disbursement of public moneys, is a binding contract between him and his sureties and the United States, although such bond may not be prescribed or required by any positive law. *The right to take such bond is, in our view, an incident to the duties belonging to such a department.*”

*United States vs. Bradley* supra cites *United States vs. Tingey* with approval and states that the United States has capacity to take a voluntary bond in cases within the scope of the powers delegated to the general government by the Constitution, through the instrumentality of the proper functionaries to whom those powers are confined.

We do not deny the capacity of the United States to enter into contracts and take bonds, etc., through the instrumentality of the proper department; we do not deny the capacity of the principle, but the authority of the agent. It is elementary that an agent

can act for the principle only within the scope of his employment. This is especially applicable to governmental officials. The two cases above and the cases that will be discussed hereinafter recognize this; that a contract within the scope of the agent's employment is valid. They decide that "the right to take such bond is \* \* \* an incident to the duties belonging to such a department." It is simply a case of implied authority in the agent. An agent's authority may be first express; second, necessary; third, customary; fourth, apparent, that is, a principle has held him out as one having that authority. Nos. 2 and 3 may be put under the more inclusive head of implied authority. There can be no question concerning the authority expressly given, and where the doing of an authorized act requires the doing of something else the authority to do the second act is always implied, and customary authority may be implied. As to apparent authority or authority by estoppel, that results from a situation where *P.*, the alleged principal, holds out *A.* as agent, and *T.*, a third person, acts upon this holding out; under such circumstances *P.* is estopped to deny the authority of *A.*

The cases of common law bonds come under the implied authority of an agent. It is not necessary that a legislative enactment authorize every act that an agent may do. By giving certain authority and creating certain duties, other authority may be implied from necessity or as a proper incident to the express authority.



*United States vs. Linn*, 15 Pet. 290, another case upon common law bond, holds that the contract or security taken was within the implied authority of the agent; "It is the duty of all public officers intrusted with the execution of powers delegated to them to pursue the directions of the law. But to construe all such laws as a *special delegation of authority, to be strictly and literally pursued* \* \* \* would frequently defeat the object and purpose of the law." It is not necessary to call the attention of the court to such cases as *Osborn vs. Bank of the United States*, where the court said, "It is not unusual for a legislative act to involve consequences not expressed," or to *McCullough vs. Maryland*, dealing with the doctrine of implied powers.

*Postmaster General vs. Early*, 12 Wheat. 136, decided by Chief Justice Marshall, is another good illustration of the grounds of liability in the so-called common law bond. In a suit upon a bond given by a deputy postmaster, Marshall clearly shows that it is a question of express or implied authority:

"the inquiry, then, is, whether, under a fair construction of the acts of congress, the Postmaster General may take bonds to secure the payment of money due, or which may become due to the General Post Office. All the acts relative to the post office make it the duty of the Postmaster General to superintend, to regulate the conduct and duties of his deputies and to collect the moneys received by them for the general post office. May not these powers extend to the tak-

ing of bonds from the officer who is to perform them? May not these bonds be considered as means proper to be used in the collection of debts and in securing them?

“If this interpretation of the words should be too free for a judicial tribunal, yet if the legislature has made it; if congress has explained its own meaning too unequivocally to be mistaken, the courts may be justified in adopting that meaning, etc.” (showing congress in describing the power and duty of the Postmaster General, understood that the Postmaster General had this power).

It is needless to cite other cases; they are practically all cases of official bonds where the officer receives money and is under a duty to pay it over; or where a superior official is in charge of and responsible for the conduct of his deputies, and as an incident to his office takes bonds from his deputies for the faithful performance of their duties.

The court below held that “the power to accept or require such an undertaking is an administrative power fairly and reasonably incident to the power to remit or refuse to remit upon consideration of facts presented as a basis for desired remission.” In other words, held that the bond was good as a common law bond. As already pointed out, there is no logical or necessary connection between the power to remit a penalty and the power to determine or impose a penalty.

As an example showing that the power to remit a fine does not give the holder thereof the power to



impose a fine, see *Sherlock vs. United States*, 43 Ct. of Cl. 161. The Postmaster General has the power under certain circumstances to remit the penalties incurred by postal employees, this power being based upon statute, but he cannot impose a fine upon them. In the case of *Sherlock vs. United States*, supra, the court says :

“The question before the court for decision is whether the statute quoted or any law of the United States authorizes the postmaster general to impose fines and enforce their collection as was done in this case? This court is reluctant to render a decision which will interfere with the established discipline of any other department of the government, but when a case is presented to us we are compelled to decide the law as we believe it to be regardless of the effect of such decision. We have no doubt that the rule of the post office department in question as hitherto has always been so administered as to be a great benefit to the service, but that is always true of arbitrary power when in beneficent hands; and we cannot believe that Congress ever intended to place any such power in the hands of the head of any of the departments of the government.”

So the court was in error in holding that the power to exact such a bond is an incident to the power to remit penalties. It might possibly be conceived that the power to exact a bond whereby the accused agreed to pay such penalties as may have been incurred could be considered as an incident of the power to remit, but the determination of the penalty, as already pointed out, is a judicial question and one that the courts alone can determine under the provisions of this Act. No authority to make such a determina-

tion is expressly given to the Secretary and none can be implied.

Another erroneous conclusion of the court is that the application for remission (if such there be) must necessarily be an admission of guilt which binds the master after the Secretary's refusal to admit. Certain cases are cited by the court for the proposition that the party must admit his wrong in pleading for a remission. An examination of the cases cited by him does not sustain this position. The case of *United States vs. Morris*, 10 Wheat. 246, decides that under the Act of March 3, 1797, the Secretary of the Treasury has authority to remit a forfeiture under the revenue laws at any time before or after sentence until the money is actually paid over for distribution; such remission extends to the shares of the forfeiture to which the officers are entitled. The whole question was whether the rights of the officers or informers became vested upon entry of judgment so that the Secretary could not remit the share claimed by them.

The *Princess Orange*, 19 Fed. Cases, 1336, Fed. Case No. 11431, in passing on the same statute held that a proceeding for the remission of a forfeiture cannot be maintained until the forfeiture has proceeded to judgment, the court basing its opinion upon the words "shall prefer his petition to the judge of the district in which such fine *shall have accrued*," such words not including a contingent liability. The court also cites *United States vs. Morris*, where the judge says that a strict construction of the *act* in question would forbid any application for remission



till judgment of conviction or condemnation had passed. However, taking the case of the Princess Orange according to the trial judge's interpretation, it would not mean that the master had confessed his guilt, that the filing of a petition for a remission is in itself an admission, but that the court would not consider an application for a remission until he had confessed it.

“The petitioner, if he applied before sentence of condemnation, must equivocally admit the act of forfeiture in order to give either the judge or the secretary jurisdiction of the matter. This the petition now before you fails to do. It guardedly states ‘that the jewels in the possession of Polari and considered as his property was subjected to forfeiture and that considered as his property would be so adjudged.’ This if accompanied by no restrictions or qualification would be an exceedingly faint and vague admission of the fact of forfeiture. If made by Polari himself it would hardly amount to such a concession of the facts to justify a sentence of condemnation in court or afford occasion to ask for a remission. It is not inconsistent with the entire immunity of the property. When made by a third person, who denies the title of Polari, is not even an admission. Clearly it was not intended to be an admission which would bind the property if the Secretary of the Treasury refused to remit this supposed forfeiture.” *The Princess Orange*, supra.

In the Princess Orange case the court held that no forfeiture had been incurred and refused to take jurisdiction. It is to be noticed that the proceeding under that statute was a legal proceeding in a court

of law where the petition was regarded as a pleading and this pleading showed on its face that no forfeiture had been incurred—quite a different situation from the present case.

We do not think it can be seriously contended that because an accused person applies for a remission of an “alleged” penalty he thereby admits his guilt; in fact, most of the applications for pardons or remissions of penalties are based upon the fact that the accused person is innocent of the crime charged or was unjustly convicted. As a matter of fact, it is stated in *United States vs. Morris*, supra, “Many defenses are not only consistent with the claim for remission, but furnish in themselves the best ground for extending the benefit of the Act to the party defendant. He who supposes his case not to come within the construction of the law \* \* \* cannot be visited with moral offence either in the act charged or the defense of it, yet how is the question of right ever to be decided unless he is permitted to *try the question before a court of law?* In such a case pertinacious adherence to his offense cannot be imputed to him since resisting the suit on the one hand while he sues for remission on the other amount to no more than this, *that he denies having violated the law: but if the court thinks otherwise he then petitions for grace on the ground of unaffected mistake:* a point on which, of course, he must satisfy the Secretary before he can obtain a remission.”

The other cases cited by the court as standing for the proposition that the Collector could require the



bond in question are merely cases dealing with common law bonds or implied powers of government officials; for example, *United States vs. Garlinghouse*, Fed. Case No. 15189, is such a case. *Neilson vs. Lagon*, 12 How. 97, is a case with a dictum concerning implied powers although the actual decision is that land conveyed to trustees to sell to pay debts due the United States does not violate the Act of Congress "that no land shall be purchased on account of the United States except under a law authorizing such purchase." No one questions the right of the government to take bonds through the proper officials concerning proper subjects, but we do question the right of an executive official to give to himself judicial power by exacting a bond.

The case of *Great Falls Co. vs. United States*, 16 Ct. Cl. 160, 195, cited by the court on this question of implied power, is an interesting case dealing with this subject of arbitration. In that case the Secretary of War had authority to condemn land for a certain purpose or he could purchase it. The land was acquired by sale at a fair price determined by appraisers. The court held that this was not an arbitration as the act of the appraisers was subject to the ratification of the parties in interest, that the Secretary was not bound by the prices set by the commission but was merely seeking counsel from competent advisers and their decision had only moral effect. Clearly in a case of that kind, if the owner had refused to accept the finding of the commission, the government could not have brought suit to enforce

the award (as it was not bound, the other party would not be bound), but it would have been necessary for it to condemn the land by suit or make terms with the owner. So in the present case, if one party refuses to accept the finding of the arbitrator, to wit: the Secretary of Commerce and Labor, a suit cannot be brought upon this finding of the Secretary, but it is necessary for the master's liability to be determined in a judicial proceeding against him.

There can be no hardship or injustice in holding that the Secretary of Commerce and Labor in taking the present bond giving himself the power to determine the penalties for alleged violations of the law exceeded his authority and that such determination was not legally binding. The government is not barred from bringing suit against the vessel or the master for alleged violations of the law, and can determine the guilt of the master in a proper proceeding. On the other hand, the results of executive usurpation of the functions of the judiciary are far-reaching. It does not require a close student of history to know that the life of most constitutional governments consists of the gradual growth of the functions of the executive department till executive domination results in the destruction of legislative and judicial freedom—results in a government of men rather than a government of laws. The court below in its zeal to enforce the bond seems to have overlooked this point. We need only call to the attention of this court one of its own decisions, the case of *United States vs. Kauhoe*, 147 Fed. 185, to show that



this court has consistently maintained that a government official can act only within the scope of his authority.

The overruling of the motion in arrest of judgment is urged as error. An examination of the complaint discloses that the suit is based upon a decision of the Secretary of Commerce and Labor to the effect that the master had incurred certain penalties. As pointed out in the statement of facts, the complaint recites the execution of the bond, the condition of the bond, to wit: that the principal shall pay the amount which the Department of Commerce and Labor shall upon presentation of the facts determine that the said principal is liable for on account of penalties alleged to have been incurred. The next paragraph of the complaint states that the Department of Commerce and Labor did determine that the said James F. Findlay was liable to the United States on account of certain penalties and did determine that the liability did amount to the sum of \$7960.00. The third paragraph states that notice of this determination was given to the plaintiffs in error and demand made upon them. The fourth paragraph states that the amount has not been paid and that \$7960.00 was due from the plaintiffs in error. The complaint contains the usual prayer for judgment. A copy of the bond is attached to the complaint.

This bond recites that whereas the Collector of Customs had given notice to the master that he had incurred penalties on account of alleged violations of

the Passenger Act and that whereas the Collector of Customs had been authorized to grant clearance upon being furnished a penal bond for \$15,000.00.

“to insure the payment of such penalties for such violations aforesaid as shall be *determined* by the Department of Commerce and Labor *to have been incurred* by the said master”

after the presentation of the facts by the master and United States officials. The condition of the bond was that the plaintiffs in error should pay the amount that the Department of Commerce and Labor should determine that the principal was liable for on account of the penalties so alleged to have been incurred.

“To pay penalties as shall be determined to have been incurred” after the presentation of the facts admits of no other construction than an original determination of the facts of the “alleged” violations of the law. Further discussion of this point is unnecessary. As a matter of fact, the Collector’s own letter (Exhibit 10, pp. 123-124) of April 18, 1911, to the District Attorney shows that his interpretation of the law was that he himself should determine the amount of penalties incurred and collect the same; as the Collector expressed it in his letter:

“He understood that the collector should collect the penalties” and that the misdemeanors should be submitted to the District Attorney for prosecution.

This letter also shows that the court committed error in claiming that the plaintiffs in error were estopped to deny that the master had applied for a remission of the penalties. It shows clearly that the



Collector thought it was within his power and the power of his department to determine the amount of the penalties incurred. Of course, the authority of the Collector of Customs or the Secretary of Commerce and Labor cannot be increased or created by estoppel. The plaintiffs in error could not and did not mislead the Secretary as to his own authority to take the bond in question. The elements as ordinarily given from which an estoppel arises are:

*First*, false representations of matters of fact made by the party sought to be estopped; *second*, for the purpose of inducing the party seeking the estoppel to act; *third*, the falsity of such representations must have been unknown to the party seeking the estoppel; *fourth*, the party seeking the estoppel must have acted upon such representations to his own detriment.

The finding of the court that the language of the bond was ambiguous and the admission of evidence to explain the alleged ambiguity is urged as error. It is difficult to see any ambiguity in the wording of the bond. Its language has been discussed in this brief, so it is unnecessary to set it out at length; it is in substance a bond to insure the payment of such penalties as shall be determined to have been incurred, and provided for the presentation of facts to the arbitrator (to wit: the Secretary) who was to make the determination. It could scarcely be more clearly expressed. Also the declaration shows the theory upon which the bond was given. Furthermore, the judgment in this case was entered for the

amount of penalties found due by the Secretary plus interest upon this amount from the date of notice of this determination, thus showing that the decision of the Secretary was regarded as determining the liability.

The court needs no authority upon the parole evidence rule; an unambiguous written instrument comprising a complete contract cannot be varied by parole, especially when such variation substitutes another and different contract from that executed by the sureties. A surety has a right to stand upon the letter of his contract, and the court cannot go back of the bond to impose upon him a greater or different liability than the one assumed.

The admissibility of the evidence offered upon the re-hearing can be briefly disposed of. If, as a matter of fact, a penalty had been legally imposed upon the principal, Findlay, by the Secretary of the Department of Commerce and Labor, then the sufficiency of the evidence would be immaterial in a proceeding upon the bond to enforce such determination. If, on the other hand, the decision of the Secretary did not amount to a legal determination of liability, all the evidence offered was immaterial and incompetent inasmuch as the suit upon the bond was not one to determine the amount of the fines and penalties, but was a suit to enforce a decision of the Secretary. (See the complaint and bond.)

Furthermore, the so-called evidence, such as the letters of the Collector of Customs to the District Attorney and to the Secretary of Commerce and Labor, respectively, the letter of the Portuguese



Consul to the Governor of Hawaii and the extract from the report of the Grand Jury, is hearsay and represents merely the opinion of the declarants as to the guilt of the master, Findlay. It is elementary that such evidence is inadmissible. That such evidence was highly prejudicial to the plaintiffs in error is shown by the attitude taken by the court thereafter throughout the proceeding.

Respectfully submitted,

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Attorneys for Plaintiffs in Error.

Dated February 26, 1915.

*S. H. Derby.*  
*Of Counsel.*

No. 2511. 3

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IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT.

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JAMES F. FINDLAY, T. CLIVE  
DAVIES and W. H. BAIRD,  
*Plaintiffs in Error,*

VS.

UNITED STATES OF AMERICA,  
*Defendant in Error.*

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**REPLY BRIEF OF DEFENDANT IN ERROR**

Upon Writ of Error to the United States District Court of  
the Territory of Hawaii.

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JOHN W. PRESTON,  
United States Attorney for the North-  
ern District of California,  
Attorney for Defendant in Error.

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*Filed this.....day of March, A. D. 1915.*

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

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## REPLY BRIEF OF DEFENDANT IN ERROR

Upon Writ of Error to the United States District Court of  
the Territory of Hawaii.

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### PRELIMINARY STATEMENT.

The defendant in error recovered in the court below a judgment against plaintiffs in error in an action of debt upon a bond given through the Collector of Customs at Honolulu, to the United States, relating to the payment of certain penalties incurred



by the master of the British steamship "Orteric", touching certain violations of the Passenger Act of 1882 as amended, the plaintiffs in error being the principal and sureties respectively on said bond. A jury trial was expressly waived, and no special findings were made or requested. The Court gave and caused to be entered a general judgment in the case.

## WHAT QUESTIONS MAY BE CONSIDERED.

No request for special findings having been made, the limitations upon the Court as to what may be considered is well settled. We need only refer to the very recent expression of this Court on this very question found in *Dunsmuir vs. Scott*, 217 Fed. 200, where the Court uses this language:

"Under the provisions of Act March 3, 1865, 13 Stat. 501, Rev. St., secs. 649, 700 (U. S. Comp. Ct. 1913, secs. 1587, 1668), the rule is well settled that if a jury trial is waived, and a general finding is made by the court, review in an appellate court is limited to such rulings of the trial court in the progress of the trial as are presented by a bill of exceptions, and that the bill of exceptions cannot be used to bring up the oral testimony for review. *Norris v. Jackson*, 9 Wall. 125, 19 L. Ed. 608; *Dirst v. Morris*, 14 Wall. 484, 491, 20 L. Ed. 722; *Grayson v. Lynch*, 163 U. S. 468, 16 Sup. Ct. 1064, 41 L. Ed. 230; *Streeter v. Sanitary District of Chicago*, 133 Fed. 124, 66 C. C. A. 190; *Hill v. Walker*, 167 Fed. 241, 256, 92 C. C. A. 633; *W. L. Perkins & Co. v. Von Baumbach*, 185 Fed. 265, 107 C. C. A. 371; *New York Life Ins. Co. v. Dunlevy*, 214 Fed. 1. In *Dirst v. Morris*, Mr. Justice Bradley said:

" 'But as the law stands, if a jury is waived

and the court chooses to find generally for one side or the other, the losing party has no redress on error, except for the wrongful admission or rejection of evidence.'

"The question whether or not, at the close of the trial, there is substantial evidence to sustain a finding in favor of one of the parties to the action is a question of law which arises in the progress of the trial. Where the trial is before a jury that question is reviewable on exception to a ruling upon a request for a peremptory instruction for a verdict. Where the trial is before the court, it is reviewable upon a motion which presents that issue of law to the court for its determination at or before the end of the trial. In the case at bar there was no such motion and no request for a special finding. We are limited, therefore, to a review of the rulings of the court to which exceptions were reserved during the progress of the trial."

### FULL STATEMENT.

But assuming that the Court may consider all the questions argued, with confident belief that both law and equity are with the Government in this case, we will proceed to a further consideration of the matters involved, and adopt the complete and accurate statement of facts given in the memorandum opinion of the Court below.

This is an action of debt to recover \$7,960 on a bond of the defendant Findlay, master of the British steamship "Orteric", as principal, and the defendants Davies and Baird as sureties, conditioned upon the payment to the United States of America through the Collector of Customs at the port of Honolulu, of such



penalties as, in the language of this instrument, should be "determined by the Department of Commerce and Labor to have been incurred by the said master" by reason of alleged violations of the Passenger Act of 1882 as amended (hereinafter referred to as the Act): 22 Stat. 186; Act of Feb. 14, 1903, sec. 10, 32 Stat. 829; Act. of Feb. 9, 1905, 33 Stat. 711; Act of Dec. 19, 1908, 35 Stat. 583. By stipulation in writing the case was submitted to the Court for determination without the intervention of a jury. From the evidence the facts appear as hereinafter set forth.

On arrival of the British steamship "Orteric" at the port of Honolulu, April 13, 1911, on a voyage from Oporto and Gibraltar, carrying passengers composed mainly of Portuguese and Spanish immigrants destined for Hawaii, an examination of the vessel was made by customs officers assigned to that duty by the Collector pursuant to the provisions of the Act, section 11. This inspection resulted in a report of April 17, disclosing violations of the following sections of the Act: 2, relating to berths; 3, light and ventilation; 4, food; 5, hospitals; 6, discipline and cleanliness; 7, posting of notices prohibiting ship's company from visiting steerage quarters. Immediately the Collector gave written notice to the master of his liability to penalties in respect to the ship "Orteric" for these violations, specifying them in detail, and also for violations of section 9 relating to passenger manifests. Moreover, this notice stated the maximum penalty in each instance, offering an opportunity "to present any statements desired", and di-

rected attention to section 13 of the Act providing a lien upon the offending ship for these penalties. Thereafter the local agents of the "Orteric" directed to the Collector a letter dated April 22, requesting him to cable to the Secretary of Commerce and Labor (hereinafter called the Secretary) for permission to grant clearance to the "Orteric" "upon a satisfactory bond being furnished for the payment of any penalties which may be imposed in respect to the alleged violations of the Passenger Act by that steamer, \* \* \* full particulars regarding the matter to be furnished to the Department of Commerce and Labor for their determination of what shall be done in connection therewith." On the same day the agents had already directed another letter to the Collector, making "application for clearance of the said steamer for Victoria, British Columbia," and "in view of the alleged violations" offering to "furnish an adequate bond covering the same, providing that the facts concerning such alleged violations be submitted to the Secretary \* \* \* for determination". The Collector, by cable, notified the Secretary of the application for clearance "under bond covering alleged penalties" and recommended "favorable consideration", to which the acting Secretary replied by cable of April 22, "With approval United States Attorney clear 'Orteric', fifteen thousand dollar bond." The bond in suit, for this amount, was thereupon executed and by the United States Attorney was "approved as to form and sureties". The bond recites, by way of introduction, the Collector's notice to the master of



the latter's having "incurred certain penalties on account of alleged violations" of the Act, and the department's authority to the Collector to grant immediate clearance upon the furnishing of an approved bond "to insure the payment of such penalties for such violations aforesaid as shall be determined by the department \* \* \* to have been incurred by the said master after the presentation within a reasonable time, by the said master, or his agents or attorneys, and the officials of the United States at Honolulu, of the facts, to said department." The condition of the bond is the payment by the master to the United States through the Collector, of "the amount which the Department of Commerce and Labor of the United States shall, upon such presentation of facts, determine that the said principal is liable for on account of such penalties so alleged to have been incurred". Upon delivery of the bond to the Collector, on April 23, clearance was granted forthwith.

Thereafter the Honolulu attorneys for the master sent to the Collector a letter dated April 27, in which "in order to preserve the rights" of their client, they "formally enter protest against the imposition of the penalties aforesaid and all penalties whatsoever that may be imposed on account of alleged violations" of the Act, but promise to file with the Collector as soon as possible "a full statement of the facts concerning the said alleged violations, to be submitted to the Department of Commerce and Labor in order that it may arrive at a proper determination of the matter".

After some extension of time granted to the master for his submission of facts, the Collector, on June 14, received from the Honolulu attorneys a letter "submitting for presentation to the Department of Commerce and Labor" the affidavits of the master, the chief officer, the ship's doctor, and one of the nurses of the "Orteric," and "copies of notices in the English, Portuguese and Spanish languages, which were posted according to the above mentioned affidavits as required by said section 7" of the Act, and which the master's attorneys state were "obtained" by them "on board the S. S. 'Orteric' from the captain and chief officer thereof". Also, this letter promised an endeavor to have the owners furnish the department with a copy of the ship's plans and specifications referred to in the master's affidavit, and asked permission to submit a supplementary presentation of facts concerning the alleged violations of section 3, as to ventilating apparatus, by affidavit or affidavits to be secured immediately upon the return of a Mr. Campbell who was to arrive in Honolulu on June 16, and who was expected to establish inspection and approval of the ventilating apparatus at the port of clearance by emigration officers. There is no evidence before the Court, however, that any submission of the plans and specifications, or any supplementary presentation of facts as to ventilating apparatus, was ever made. A summarization of the affidavits follows:

Section 2, Berths: The master admits the violation of section 2 of the Act in that all single male



passengers were, after March 5, not berthed in the fore part of the vessel in a compartment separate from the space or spaces appropriated to other passengers, but on account of a riot between the Spanish and Portuguese male passengers it was, "in order to maintain discipline and prevent bloodshed, \* \* \* deemed mandatory to segregate the Portuguese passengers from the Spanish passengers, and therefore the affiant removed said Portuguese male single passengers from said compartment in the fore part of the said vessel aft".

Section 3, Light and Ventilation: The master does not attempt to show the ship's provisions for light and ventilation to have conformed with the requirements of the Act but deposes to his "belief that the ventilating devices in each compartment occupied by passengers \* \* \* were equal in capacity and utility to the ventilating specifications set forth in section 3 of the Act, \* \* \* as will be more particularly shown by a copy of the plans now in possession of \* \* \* the owners of said steamship, and the specifications attached thereto, to be supplied for use in connection with this affidavit", (but, as above noted, not supplied). On the contrary, the master attempts to bring the case within the concession made by this section of the Act, that "in any steamship the ventilating apparatus provided, or any method of ventilation adopted thereon, which has been approved by the emigration officers at the port or place from which said vessel was cleared, shall be deemed a compliance with the foregoing provisions". In this

behalf, he deposes "that on the 21st day of February, 1911, the said steamship was cleared from the port of Oporto in Portugal, \* \* \*; that on the day preceding about 10 Portuguese officials, among whom affiant believes were included Portuguese emigrant officials, carefully inspected the said steamship, \* \* \* with reference to construction, equipment, food supply, and ventilation, and (the said steamship) was approved in all such respects and otherwise by all of said officials". As to water-closets in number in proportion to the number of passengers according to the requirements of said section 3, \* \* \* all enclosed, some of which were located on one side of the upper deck \* \* \* and the others on the other side of said upper deck." Nothing is said as to the closets being "properly enclosed and located" or "kept and maintained in a serviceable and cleanly condition throughout the voyage", within the provisions of the Act, though these were subjects of complaint by the Collector, and though the point to which the affidavit is especially directed, sufficiency in number of closets, is not made by the Collector at all but is conceded by his letter of April 17, and therefore called for no reply or statement in behalf of the ship. Moreover, the benefit of official inspection is not extended by the above exception to the matter of closets.

The affidavit's introductory statement should here be noted, "that on the 24th day of February, 1911, the said steamship left Gibraltar with about 1,500 Spanish and Portuguese emigrant passengers aboard



whose destination was Honolulu; that about 550 of said passengers were Portuguese and the remainder Spanish; and it should be noted that nothing was said as to whether some of these passengers were taken on at Gibraltar—in which case a new and favorable inspection would be required, to bring the case within the benefit of the above exception. The above-mentioned report of the inspectors was in the hands of the Secretary for consideration in this case; it shows that 1,000 of the passengers were taken on at Gibraltar, after there had been taken on at Oporto, three days before, but 300 passengers, and at Lisbon, two days before, only 252 more. So the master, while claiming exemption, has failed to show that he is within the proviso of section 3—indeed, has apparently attempted to mislead the Secretary by such a suppression and perversion of facts as would imply an inspection after all, instead of about a third of the passengers, had been taken aboard.

Section 4, Food: The master here also deposes by way of concession and justification, or confession and avoidance, “that while milk for infants and children was served regularly only twice a day, nevertheless mothers of such infants and children were at all times supplied upon application with condensed milk at other times, and often served at irregular times without application”.

Section 5, Hospitals: The master deposes that the hospital compartments were “ventilated by large skylights and portholes”, but does not meet the complaint that the ventilation was insufficient. He also

deposes to the utilization as hospitals of two large compartments aggregating more than 1,500 square feet, but gives details showing that the access of air was not direct and was cut off in rough weather. On this point the affidavit appears to dodge the question of the suitability of the regular hospital and to attempt to divert attention therefrom to two special, makeshift hospitals.

Section 6, Discipline and Cleanliness: The master makes no denial of the alleged filthy condition of the ship, but deposes that he, the chief officer, the ship's doctor, and an interpreter, almost every day, and one or more of them every day, inspected the ship and passengers and "warned and directed the passengers to keep themselves in a cleanly condition and to stay on the upper deck as much as possible", and "directed said passengers to air their baggage and bedding whenever the weather would permit, but with few exceptions the said passengers refused to do so, stating that they feared their belongings would be stolen", and he deposes that on account of the great number of passengers, the crew could not air the bedding and baggage without the passengers' assistance, and that at all times the crew "was engaged in cleaning the decks and compartments, and did all in that respect that could reasonably be done". The master thus, in effect, regards the statutory duty of the ship as performed by its officers' merely directing the passengers to maintain cleanliness. The ship's condition of disorder and filth on arrival at Honolulu is attributed to excitement of the passengers in view of



the approach of landing and end of the voyage—who threw the remnants of their breakfast about the floors and decks, instead of overboard as they had customarily done theretofore, and also to the tearing of cloth from mattresses in order to make bags for their belongings, with consequent scattering of the mattress-stuffing. And it is stated, that it was at the Collector's direction that the ship was left in this condition for several days after docking, a precaution, by the way, which enabled the inspectors and the grand jury, who also visited the ship, to see conditions *in statu quo*.

The master then deposes to the posting of copies of section 6 of the Act in the Portuguese and Spanish languages, in all of the companionways, and in various parts of the vessel; but states that in the course of the voyage many of them were torn down by passengers, and that such notices were again posted about two weeks before reaching Honolulu; also that very few of the passengers could read—as if the Act made this posting at all dependent upon the literacy of the passengers.

Section 9, Passengers' Manifest: The master admits that "the shifting of the passengers in order to segregate the Spanish from the Portuguese, resulted in some confusion, making it impossible for affiant to include in the list of passengers the exact compartments and spaces occupied by them thereafter".

The affidavit of the chief officer "confirms \* \* \* in all respects" the affidavit of the master, as does the affidavit of the ship's doctor. The doctor also de-

poses that all compartments and decks were swept not less than twice daily, and were treated daily with a suitable disinfectant; that he would not permit the washing of apartments occupied by passengers because in his opinion and from the experience of physicians in charge of emigrant vessels, such washing results in unavoidable dampness highly detrimental to health. He deposes that "any and all accumulations \* \* \* were rendered physically harmless and innocuous by disinfectants", and "the sleeping apartments were scraped with shovels every day and swept", and "most of the litter found on board \* \* \* at Honolulu was the result of food and rubbish and the contents of mattresses being thrown or strewn about the deck by the passengers in their excitement and haste to land". He says that "the temporary or additional hospital quarters \* \* \* were, in the opinion of the affiant, well suited to that purpose considering the circumstances", but though deposing that he "directly superintended all of the sanitation and sanitary measures", he says nothing about the regular hospital and its ventilation. "The mortality on board said vessel", he attributes "very largely to the concealment by parents of the ailments of their children and their refusal to submit them to medical treatment". "While," as he says, "milk was served regularly only twice a day, nevertheless condensed milk was served at irregular times each day to the mothers for the use of such children, both upon application and without application"; "constant inspection was made by affiant, and milk supplied in



all cases where it was found necessary", and "a quantity" (stating it) of condensed milk was provided "ample for the requirements of the children and nursing mothers". The water supply for bathing and washing of said passengers was unlimited, and the usual accommodations for washing existed.

One of the nurses deposes that "she assisted throughout said voyage in caring for the passengers who were ill and for infants; that milk was served twice daily regularly \* \* \* and at irregular times in addition whenever desired by the mothers of infant children and also whenever it appeared necessary to the hospital staff; that affiant believes that milk in ample quantities was served at all times". Her statements as to hospitals and ventilation is the same in substance as that of the master, whom she also confirms as to the riot and the consequent segregation of Portuguese and Spanish.

The Collector thereupon, on June 17, forwarded to the Secretary, the master's showing of affidavits and copies of posted notices, and the Collector's own showing which consisted of the bond in suit, the above-described letters and cablegrams (by original or copy), also the inspector's report of the vessel's condition, and a letter of the Collector to the United States Attorney at Honolulu dated April 17, transmitting this report and calling attention to the violations of the Act, a letter (copy) of April 18 of the Portuguese Consul at Honolulu to the Governor of Hawaii protesting against the sanitary conditions of the vessel, the report (copy) of the grand jury for

the April, 1911, term of this Court adverse to the master on the same points as covered by the above-described letter of the Collector to the master. And a few merely formal and immaterial letters of acknowledgment and of transmission between the Collector and other officials were included among the papers presented to the Secretary. He also had before him a letter directed to the department by the Washington attorney for the owners, dated April 22, but not received until two days later, and perhaps of no bearing on the question of the object of a bond the negotiations for which had already been consummated by other, and the leading attorneys in the matter at Honolulu, but which in fairness to the respondents should nevertheless be mentioned as possibly not so equivocal as the bond and the preceding Honolulu correspondence, and as more clearly capable of being read as contemplating some kind of an "adjudication", *i. e.*, arbitration, by the Secretary. Though, under all the circumstances, the conclusion is inevitable that, even if this letter did imply an arbitration, it would not express the actual object of the negotiations. This conclusion is borne out by several considerations. In the first place, the Washington attorney had no part either in the preparation of the bond, or of the submission pursuant thereto, *i. e.*, of the matter which the bond was intended to cover and which would indicate the bond's purpose; and it may be fairly found from the evidence, direct and circumstantial, that any light of his statements would be at most no more than dimly reflected light. Even



giving his use of the word "adjudication" a strict sense, certainly not called for by any controlling fact or presumption of fact or of law (but quite the contrary), he, still, was not in as good position to characterize the proceedings as were those others who were active in the actual negotiations and on the field, and whose request for clearance discloses that the object of the proposed submission of "full particulars regarding the matter", was the Secretary's "determination of *what shall be done in connection therewith*" (agent's letter of April 22, above). Furthermore, while it might be a possible, though it is by no means a necessary, nor even the probable or reasonable inference from the Washington attorney's letter of April 22, that it was he who had the first advice and direction from the owners of the vessel and so himself initiated the proceedings; still it is important to repeat that the Honolulu attorneys were the ones on the ground and that it was really their application for clearance, or that of the local agents under their guidance, which was acted upon, and not the application of the Washington attorney, whose letter, as suggested above, did not reach the department until two days after the vessel had cleared—sent on a Saturday and not received until the following Monday (as shown by the department's receipt stamp on the face of the letter). Also, after the submission to the Secretary this attorney, though specially requesting by letter of July 11, further time for presentation of a "Written brief of his contentions" to be "supplemented \* \* \* by a verbal

presentation" of "the points which he desires the Department to consider", nevertheless failed to present any defense of the master or any argument in support of a defense—indeed, did not appear at all, as he would naturally have done if the consideration of the Secretary had been *quasi*-judicial instead of executive, *i. e.*, in the nature of judgment on disputed facts rather than of pardon for admitted acts.

This letter of April 22 recites the vessel's detention for alleged breaches of the Act, the details of which are unknown, and in view of the time required for this attorney and the Secretary to fully ascertain the facts and of the urgent importance of minimizing delay (as a cargo waited at Seattle), requests the department to instruct the Collector by cable to report by cable "the cause of the detention with such details as may be necessary to enable the department to act on the owner's request, which is that permission be granted to the vessel to proceed on her voyage "upon her master or Honolulu agent entering into bond for the making good of any penalty found to be due either by the vessel or the master, and that upon the coming in of a formal report of the matter the questions involved be then adjudicated upon after hearing".

The Collector, in his letter of June 17 transmitting the papers in the case, reported penalties aggregating \$7,960 as follows: "Section 2, \$5 for each statute passenger—1,242 at \$5—\$6,210; section 3, penalty of \$250; section 4, misdemeanor reported to United States Attorney; section 5, penalty of \$250; section 6, penalty of \$250; section 7, misdemeanor reported to United



States Attorney; section 9, penalty of \$1,000." And it will be observed that in the consideration of the case, no action was taken as to the violations of a criminal nature, alleged in the Collector's letter notifying the master of his liability, namely, breaches of sections 4 and 7 of the Act, which are misdemeanors.

On December 4, 1911, the acting Secretary directed to the Collector a letter in this matter, which he characterizes as "the application of James Findlay, master, for relief from the penalties incurred in the case of the steamer 'Orteric' for violations of the Passenger Act", namely, sections 2, 3, 5, 6 and 9, but not sections 4 and 7 involving misdemeanors. After reviewing at length the report of the grand jury, the acting Secretary concludes:

"From the papers submitted, it is evident that this vessel with 1,242 statute passengers was navigated on a voyage of eight weeks under all conditions of weather in violation of practically all of the provisions of the Passenger Act having to do with the health, comfort and well being of the passengers. The death of 57 children during the voyage marks this as the worst case ever submitted to the Department. The sexes were not properly segregated during a large portion of the voyage, the master stating that the confusion was such that it was impossible for him to state in the manifest the exact compartments and spaces occupied by the various passengers. The ventilation of the ship appears to have been wholly inadequate, this lack of ventilation in the opinion of the grand jury, increasing the rate of mortalities. Ill-ventilated hospital facilities without adequate equipment were furnished; the manifest of the vessel was not completed, and the sanitary conditions of the vessel were inexcusable. The

Department concurs in the following extract from the report of the Grand Jury:

“‘We cannot emphasize too strongly the necessity for the observance of the regulations requiring vessels to be kept in a clean and sanitary condition. When poor immigrants, perhaps unaccustomed to modern methods of sanitation, are brought into a tropical climate such as Hawaii, not only their own good, but the good of the community in general is subserved by a rigid insistence on compliance with the law.’

“In the opinion of the Department, penalties aggregating \$7,960 were incurred in this case for violation of the sections enumerated and it declines to intervene in behalf of the offenders.”

Due notice of this determination was given to the principal and sureties and demand made for payment of \$7,960 covering the above penalties, but such payment the obligors have refused and neglected to make.

## AUTHORITIES AND ARGUMENT.

It would seem that a correct interpretation of section 5294 of the Revised Statutes of the United States defining powers of the Secretary of the Treasury to remit or mitigate fines, penalties and forfeitures, is vital to a correct consideration of merits of the cause submitted by the record herein. This section reads as follows:

“Sec. 5294. (Remission or mitigation of fines, penalties, and forfeitures under laws relating to vessels—informers’ rights.) The Secretary of the Treasury may, upon application therefor, remit or mitigate any fine, penalty or forfeiture provided for in laws relating to vessels or dis-



continue any prosecution to recover penalties or relating to forfeitures denounced in such laws, excepting the penalty of imprisonment or of removal from office, upon such terms as he, in his discretion, shall think proper; and all rights granted to informers by such laws shall be held subject to the Secretary's powers of remission, except in cases where the claims of any informer to the share of any penalty shall have been determined by a court of competent jurisdiction prior to the application for the remission of the penalty or forfeiture; and the Secretary shall have authority to ascertain the facts upon all such applications in such manner and under such regulations as he may deem proper."

It of course will not be controverted that whatever powers are granted in said section were, by section 10 of the Act of February 14th, 1903 (32 Stat., p. 829), transferred to the Secretary of Commerce and Labor.

The power granted therefore is upon "application therefor" to "remit or mitigate any fine, penalty or forfeiture provided for in laws relating to vessels" or to "discontinue any prosecution to recover penalties excepting the penalty of imprisonment, \* \* \* upon such terms as he in his discretion shall think proper".

Certainly the words "in laws relating to vessels" is broad enough to cover the Passenger Act of 1882 as amended. Certainly it is not necessary to wait for a suit, criminal or civil, to be instituted, for the Secretary is given discretionary power as to any fine, penalty or forfeiture "provided for". The words "provided for" are certainly no stronger than the word "incurred" would have been. The fact that the fur-

ther specific power in regard to pending suits is concerned, makes the conclusion certain that the power may be exercised before suit is instituted.

In fact in the case of *Pollock vs. Bridgeport Steamboat Co.*, known also as the *Laura*, 114 U. S. 411, 29 L. Ed. 146, the constitutionality of this section is expressly upheld as well as the power of the Secretary defined, and in this case a remission by the Secretary prior to the trial of an *in rem* suit by informer, was held to effectually destroy the liability of the vessel.

The syllabus was by Mr. Justice Harlan and is as follows:

“A remission by the Secretary of the Treasury under section 5294 of the Revised Statutes, of penalties incurred by a steam vessel for taking on board an unlawful number of passengers, where the remission is applied for before a suit *in rem* brought for the penalties against the vessel, by an informer, is tried, is effectual to destroy all liability in the suit.”

In line with the principle here announced are the following cases holding that this power may be exercised before, as well as after, judgment in a case:

*U. S. vs. Morris*, 10 Wheat, 246, 295-6;  
*Peacock vs. U. S.*, 125 Fed. 583, 588;  
 17 Ops. Atty. Gen., 282, 3, 4.

See, also, 24 Ops. Atty. Gen. 583, 588.

It may be contended (as it was in the court below), that this section 5294 does not apply to vessels of other countries. In this connection we can do no better than quote the apt and well considered language of the opinion of the court below as follows:



“But on this aspect of the case, counsel for the defendants argue that the power of the Secretary to remit is wanting, quite as much as the power of the collector or the Secretary to submit to arbitration; and the earnest contention is that the provision of the Revised Statutes, sec. 5294, as amended, upon which is founded the Secretary’s power to remit, does not apply to any other subject than those within the purview of the power of remission given by the original act of Congress, 16 Stat. 458, embodied in this section of the Revised Statutes, to wit, ‘any fine or penalty provided for in this act’, etc. Now, this original act, of February 28, 1871 (of which section 5294 of the Revised Statutes represents section 64), entitled ‘An act to provide for the better security of life on board of vessels propelled in whole or in part by steam, and for other purposes, “excepted from its provisions” vessels of other countries’, Revised Statutes, sec. 4400, Act of 1871, sec. 41, 16 Stat. 440. And so, if we must be guided not by what the present statute, Revised Statutes, sec. 5294, says on its face, but by what the original statute says, then it is conceded that the power to remit does not apply to the ‘Orteric’, which is ‘a vessel of another country’. But the argument overlooks the provisions of sections 5595 and 5596 of the Revised Statutes, which declares that these Revised Statutes ‘embrace the statutes \* \* \* in force on the 1st day of December, 1873, *as revised*’, and that ‘all acts of Congress passed prior’ to said date, ‘any portion of which is embraced in any section of said revision are hereby repealed, and the section applicable thereto shall be in force in lieu thereof’. See *United States v. Tucker*, 122 Fed. 518, 523. Accordingly, in *United States v. Bowen*, 100 U. S. 508, 513, the Federal Supreme Court held ‘that the Revised Statutes must be treated as a legislative declaration of what the statute was on the 1st of December, 1873, and

that when the meaning was plain the courts could not look to the original statutes to see if Congress had erred in the revision'—which 'could only be done when it was necessary to construe doubtful language'. *Viethor v. Arthur*, 104 U. S. 498, 499; *Arthur v. Dodge*, 101 *Id.* 34, 36; *Deffebach v. Hawke*, 115 *Id.* 392, 402, in which Mr. Justice Field holds that 'no reference can be had to the original statutes to control the construction of any section of the Revised Statutes (even), although in the original statutes it may have had a larger or more limited application'. *Cambria Iron Co. v. Ashburn*, 118 *Id.* 54, 57; *Hamilton v. Rathbone*, 175 *Id.* 415, 419, 420; *The Brothers*, 10 Ben. 400; 4 Fed. Cas. 318, No. 1,968; *United States v. Sixty-five Vases*, 18 Fed. 508, 510. The suggestion of Judge Blatchford to the contrary in *The L. W. Eaton*, 9 Ben. 289, 15 Fed. Cas. 1119, 1123, col. 2, No. 8,612, has thus been overruled. See, also, 1 Lewis' Sutherland on Statutory Construction, 2d ed., sec. 271, 2 *Id.*, sec. 450."

From the above we think it logically and necessarily follows that upon application therefor, whether suit has, or has not been started to enforce penalty, the same may be remitted by the Secretary of Commerce and Labor.

### ESTOPPEL.

Plaintiffs in error should be estopped to urge that suit must first be instituted.

If we are right in assuming that 5294 of the Revised Statutes covers a case where civil penalties under the Passenger Act of 1882, as amended may be remitted, it seems clear that plaintiffs in error should



not be heard to say that suit must first be brought and the boat libeled before the power of the Secretary arises.

The first step necessary to enforce the penalties against the vessel would have been to seize her and then file the libel.

*The Fidelity*, 8 Fed. Cas. 4755.

*The Frank Sebira*, 45 Fed. 641.

*The May*, 16 Fed. Cas. 9330.

The facts are that the Collector notified the vessel of the claim for the penalties and but for the voluntary application of the agents of the vessel, she would have been seized and a libel filed to enforce the penalties.

(Trans., pp. 105 to 108.)

The bond in suit was given to prevent this very thing. The boat was thus allowed by the voluntary act of the agents of the vessel to depart the jurisdiction of the Court and thus to render enforcement of penalties improbable if not impossible. The government thus suffered detriment, prejudice and injury which is sufficient basis for holding that a case of estoppel *in pais* in favor of the defendant in error has been made out.

See Vol. 5, Encyc. U. S. Rep., pp. 937 to 50, where the authorities are collated.

Here then we have a party applying for relief upon a matter in the jurisdiction of the other party to grant. We also have the said other party altering his status and thus suffering injury by reason of the vol-

untary acts of the said party, and unless some other matter appear in this case that will defeat recovery, why should not the plaintiffs in error be held to the position so voluntarily assumed by them? Why should they be allowed to play fast and loose with the government? Why should they be allowed to "eat their cake" and "keep it also"?

Having taken all the benefits of clearing their vessel without libel proceedings against it, they should now be made to stand the burdens of the obligation given by them. The transaction, if the contention of plaintiffs be upheld, would lack at least some of the elements of good faith, a position that should not be upheld if any law exists to prevent it.

### VALIDITY OF THE BOND.

It follows if the foregoing premises are correct, to-wit, that Revised Statute 5294 applies to a case of this character, and that plaintiffs in error applied for a mitigation or remission of penalties, that a necessary implied power existed to take a bond to indemnify against loss that would follow a failure to seize and libel the vessel. The Court below pointed out authorities sustaining the right to exact or accept a bond in cases similar in principle to this. This view finds support in the following cases, among many:

*United States v. Garlinghouse*, 25 Fed. Cas. 1258, 1260, No. 15,189;

*Neilson v. Lagow*, 12 How. 97, 107, 108;

*United States v. Hodson*, 10 Wall. 395, 405-408, 409;



*United States v. Mora*, 97 U. S. 413, 419-421, 422;  
*Rogers v. United States*, 32 Fed. 890;  
*Great Falls Mfg. Co. v. United States*, 18 Ct. Cl. 160, 195.

The validity of such bonds I take to be practically admitted by counsel in their brief, pages 22 to 28, by the use of such language as this:

“We do not deny the capacity of the United States to enter into contracts and take bonds, etc., through the instrumentality of the proper department; we do not deny the capacity of the principal, but the authority of the agent. It is elementary that an agent can act for the principal only within the scope of his employment.”

The authority of the agent, to-wit, the Secretary of Labor, has already, we think, been conclusively shown. Again, on pages 28 and 29 of his brief, counsel uses this language:

“It might possibly be conceived that the power to exact a bond whereby the accused agreed to pay such penalties as may have been incurred could be considered as an incident of the power to remit, but the determination of the penalty, as already pointed out, is a judicial question and one that the courts alone can determine under the provisions of this Act. No authority to make such a determination is expressly given to the Secretary and none can be implied.”

If we assume that the penalties had already been “incurred” then out of counsel’s own mouth a valid bond could or might be exacted, counsel thus resting almost his entire case upon the point that nothing

short of a suit in court could fix a liability upon the vessel. This latter proposition we think is not sound, and if it were sound, plaintiffs in error, we think, should be estopped as above set forth, to deny it. Again we quote from the opinion of the Court below:

“Finally, counsel for the defendants would at all events save their case by the contention that ‘even if the Secretary could remit a fine, that would not give him or the Collector of Customs the power to impose a fine’. They say, ‘no penalty can be imposed upon the master until there has been a judicial determination of his liability’, and in spite of the bond, the parties are left just where they started. But, we need not take the time to determine whether the Collector or the Secretary has the power to ‘impose’ a penalty. See 17 Ops. Atty. Gen., 282, 283, 284; 24 Id. 583, 588. Here, we have an admission by the master of the alleged violations of statute: See summary of his affidavit submitted, and discussion thereof, *supra*; and where a party admits his wrong, as he necessarily must in making an application for remission of penalty (*The Princess of Orange*, 19 Fed. Cas. 1336, 1339, 1340, No. 11,431; *United States v. Morris*, 10 Wheat. 246, 295), I can see no reason nor justice in giving him this extra ‘bite at the cherry’ so that he may have two chances to clear himself instead of the one chance of the usual fair trial by his peers.”

The discussion by counsel of the above cases on pages 29 to 32 of his brief seems hypercritical. The finding of the Court in the case at bar that guilt had been admitted, seems to find ample support in the evidence, even in the bond itself, and if this be true, the application for remission was regular and valid and a discussion of what might or might not be the



effect of action under a different state of facts than here presented, can not lend value to the present discussion. Is there any evidence to support this finding? is the sole question (and this assumes that the evidence may be looked into for this purpose).

### FORM OF THE BOND.

We think the bond in suit when viewed in the light of surrounding circumstances and when itself examined from its "four corners", means nothing more nor less than an obligation to secure admitted penalties with a proviso that the amount of liability might be reduced if the penalties were remitted or mitigated. The discussion of this question by counsel for Government in the Court below seems to be in point.

"In the consideration of the question asked by the Court, we desire first to call the attention of the Court to the well settled rule that the contract must be construed, if possible, in order to have legal effect. This rule of construction is, indeed, but part of another well settled rule, that a contract will be construed according to the intention of the parties. It is not to be presumed that parties to a contract intend to enter into one which is wholly and utterly void. When the master of the *Orteric* and the sureties signed the bond in question, it is not to be presumed that they intended to engage in an idle, useless ceremony. To permit them to now contend that the agreement entered into was unlawful and void, should be done only where absolutely required.

“Some expressions of the Circuit Court of Appeals of the Eighth Circuit, employed by Sanborn, Circuit Judge, in the case of *United States Fidelity and Guaranty Co. v. Board of Commissioners*, reported in 145 Fed. p. 146, are apt. In that case a bond had been given, conditioned that ‘if the body corporate, the Toronto Bank, Toronto, Kan., shall during the period from \* \* \* well and faithfully perform the said trust reposed in it by such designation, \* \* \* and shall well and truly indemnify the said board of county commissioners of Woodson county from any and all loss which it may suffer or sustain during the period aforesaid, by reason of the designation of the said Toronto Bank, Toronto, Kan., as such depository as aforesaid, then this obligation to be void, otherwise to remain in full force and virtue’. The contention was made that the undertaking was to indemnify the board, not against the defalcations of the private bank known as the Toronto Bank, but against the defalcations of the corporation, the Toronto Bank, Toronto, Kan., which was not designated to receive, and never did receive any of the deposits of the board. Said the Court:

“The object of all construction of agreements is to ascertain the intention to the end that it may be enforced. The Court should, as far as possible, put itself in the place of the parties when their minds met upon the terms of the agreement, and then from a consideration of the writing itself, its purpose, and the circumstances which conditioned its making, endeavor to ascertain what they intended to agree to do—upon what



sense or meaning of the terms they used their minds actually met.

"The situation of these parties at the time this contract was made, the previous designation of the private bank as the depository of the funds of the county, the object of the execution and acceptance of the bond, the signature to it of the private bank as the principal, and a thoughtful study of all the terms and conditions of the contract itself, converge with persuasive force to forbid the conclusion that the Court below was in error when it found that the real intention of the parties expressed by this contract was that the obligors should bind themselves thereby to indemnify the plaintiff against the defalcations of the designated depository, regardless of the question whether that depository was a private or a corporate institution.

"Finally, the interpretation for which counsel for the defendant contend would render the bond ineffective and useless at the time it was executed by the obligors and accepted by the plaintiff and ever since. The board never designated the corporation, the Toronto Bank, Toronto, Kan., as a depository of its funds, and indemnity against losses resulting from such a designation was neither useful nor desired. That construction which sustains and vitalizes an agreement should be preferred to that which strikes down and paralyzes it. 'Such a construction should be placed upon the contract as will prevent its failure, and will give effect to the obligation of each of the parties appearing upon it at the moment the contract itself takes effect.' "

It will be noted in the case cited that evidence was permitted concerning the surrounding circumstances, even though the bond itself appears to have been in unambiguous terms.

Another case involving the principle just referred to is that of *Railroad Co. v. Kutter*, 147 Fed. 51, decided in the Circuit Court of Appeals for the Second Circuit. In that case parties to a contract set up its illegality. Says the Court:

“The fundamental rule is that a contract will be construed, if possible, as being made for a legal rather than for an illegal purpose; its application certainly should not be relaxed when a vicious construction is sought for by the party who has made the contract.”

In this case in construing the contract the Court took into consideration the actions of the party under it. Should the same rule be applied to the case at bar, the action of the owners of the *Orteric* in endeavoring to show that some of the occurrences on board the boat upon which their liability arose were caused under circumstances which would call for leniency, but which did not absolve the boat from all responsibility, would tend strongly to show that the determination of the Secretary of Commerce and Labor was a determination within his admitted powers to mitigate, and not within his determination as an arbitrator.

The case of *Hobbs v. McLean*, 117 U. S. 567, is instructive. It was there sought to have a contract of partnership, entered into with a view to carrying on work, a bid for which had already been made by one of the partners, declared void as being in conflict with a statute of the United States prohibiting assignment of claims against the United States, and it was like-



wise sought to have a subsequent agreement relative to this work declared void for the same reasons. Said the Supreme Court:

“If the articles of partnership were fairly open to two constructions, the presumption is that they were made in subordination to and not in violation of section 3737; and if they can be construed consistently with the prohibitions of the section, they should be so construed. For it is a rule of interpretation that where a contract is fairly open to two constructions, by one of which it would be lawful, and the other unlawful, the former must be adopted.”

A citation of the cases bearing on this point will be found in 17th Ency. of Law, 2d ed., pp. 17 and 18.

Akin to the proposition established by the foregoing authorities is one established by Chief Justice Marshall in the case of *Cooke v. Graham*, 3 Cranch 229, that the Court may depart from the letter of the condition of a bond to carry into effect the intention of the parties. Says the learned Chief Justice:

“There are many cases on the construction of bonds, where the letter of the condition has been departed from to carry into effect the intention of the parties.”

How far, in ascertaining the intention of the parties, may the Court go in receipt of parole evidence? An interesting and analytical discussion of this question is indulged in by Professor Wigmore (*Wigmore on Evidence*, Vol. 4, Secs. 2461-2465). In the note to Section 2465 will be found cited a number of decisions illustrating the cases in which parole evidence

may be admitted. A few particular citations on the rule are as follows:

“The rule which excludes parole testimony to contradict or vary a written instrument has reference to the language used by the parties. It does not forbid an inquiry into the object of the parties in executing and receiving the instrument.

*Brick v. Brick*, 98 U. S. 514.

“Correspondence and other extrinsic evidence may be used to ascertain the true import of a letter of guaranty written by a party in the United States to a house in England.

*Bell v. Bruen*, 1 How. 169.

“An absolute assignment of a policy of insurance may be shown to be an assignment only as a security for money loaned.

*Page v. Burnstine*, 102 U. S. 664.

“Parole evidence may be given to show that a bond was made on condition that it should be void in a certain emergency.”

*Field v. Biddle*, 2 Dallas 171.

Of course the rule that in the construction of a contract the intention of the parties may be gathered from the subject matter and the circumstances, is well settled. Particular stress is laid upon the question of the subject matter of the contract in the following cases:

*Richmond Mining Co. v. Eureka Mining Co.*,  
103 U. S. 839;

*Chicago, R. I. & P. R. Co. v. D. & R. G. R.  
Co.*, 143 U. S. 596;

*Marion v. United States*, 107 U. S. 437;

*Scott v. United States*, 12 Wall. 443.



This necessarily involves parole evidence.

In connection with this rule may be considered another well settled rule, namely, that the laws in existence at the time that a contract is made, including those which affect its validity and enforcement, enter into the contract and form a part of it.

See *Insurance Co. v. Cushman*, 108 U. S. 51.  
*U. S. ex rel. Von Hoffman v. Quinsy*, 4 Wall.  
 535.

The construction given to a contract by the parties entering into it subsequent to its execution, is entitled to great weight.

*Steinbock v. Stewart*, 11 Wall. 566;  
*Toplift v. Toplift*, 122 U. S. 121.

Assuming that it is proper to consider parole evidence of events preceding and succeeding the execution of the bond, it is not difficult at all to understand what the parties signing the bond actually did intend. Ship agents such as Davies & Company must have known the laws of the United States relative to the powers of the Secretary of Commerce and Labor. Realizing that certain powers relative to the infliction of penalties for the violation of the navigation laws were vested with the Secretary of Commerce and Labor, it is no violent presumption to say that they intended to submit to him questions which were within his jurisdiction, namely, questions concerning remission or mitigation. It will not do to say that the language of the bond shows an entirely different intent, for in truth and in fact it does not. While it

does in one part appear to pass up to the Secretary of Commerce and Labor the determination of whether or not a penalty had been actually incurred, yet, taking the whole instrument together, and reading into it the law of the land concerning the powers of the Secretary of Commerce and Labor, one must be forced to the conclusion that the intention of the makers of the bond was to secure the United States in the payment of penalties incurred, less the remission or mitigation determined by the Secretary of Commerce and Labor to be proper.

### RULINGS OF EVIDENCE.

The foregoing of course disposes of the exceptions taken to the rulings on admission of evidence, for if the bond has not been varied, but simply interpreted in the light of the surrounding circumstances, of course the evidence was admissible and this was true as well of the letters and documents forwarded the Secretary of Commerce and Labor, as of any other evidence admitted.

### OBJECTION THAT COMPLAINT DOES NOT STATE A CAUSE OF ACTION.

It is also unnecessary to consider this question further, for if the bond in suit may be considered a bond to pay admitted penalties, then the complaint states a cause of action and the judgment is amply supported by the complaint.



## CONCLUSION.

In conclusion we submit that the plaintiffs in error, because getting clearance for their steamer without delay was considered a vital business with them, voluntarily and upon their own initiative gave the bond in question. That but for the giving of the bond, the boat would have been libeled and of course detained. That the acts and conduct of the master showed an admitted liability, his only hope being that the amount might be reduced. That no rule of law or public policy vitiates this bond. That the elements of common honesty and fair dealing require that this bond be declared valid and the liability of plaintiffs in error be declared.

The case has an important bearing upon the administration of the navigation laws, and bonds of this character facilitate the disposal of cases of this kind and are a distinct convenience to the boat owner as well as to the government. Believing that no rule or law contravenes, we therefore submit that judgment of the Court below should be affirmed.

Respectfully submitted,

JOHN W. PRESTON,

United States Attorney for the Northern District of  
California, Attorney for Defendant in Error.

United States  
Circuit Court of Appeals

For the Ninth Circuit.

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JAS. F. FINDLAY, T. CLIVE DAVIES and  
W. H. BAIRD,

Plaintiffs in Error.

v.

UNITED STATES OF AMERICA,

Defendant in Error.

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**REPLY BRIEF FOR PLAINTIFFS IN ERROR**

---

Upon Writ of Error to the United States District Court of  
the Territory of Hawaii.

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HENRY HOLMES,  
WILLIAM L. STANLEY,  
CLARENCE H. OLSON,  
Attorneys for Plaintiffs in Error.

Filed

APR 30 1915





No. 2511

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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JAS. F. FINDLAY, T. CLIVE DAVIES and  
W. H. BAIRD,

Plaintiffs in Error.

v.

UNITED STATES OF AMERICA,

Defendant in Error.

---

Upon Writ of Error to the United States District Court  
of the Territory of Hawaii.

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## REPLY BRIEF FOR PLAINTIFFS IN ERROR

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The attorney for the defendant in error raises the point that there were no special findings, but does not seem to have much confidence in the same as he then proceeds to a full discussion of the evidence, which would be wholly unnecessary if his contention were tenable. It was understood by the parties and the court that it would make its findings in and by its decision, which it did very fully, and that decision, is part of the record. Certainly the court and all parties thought that special findings were



made. In the begininng of the court's findings or decision, the following statement appears: "From the evidence, the *facts* appear as hereinafter set forth,,. Again (p. 50) the court apologizes for reviewing so elaborately the whole transaction but stated it deemed it advisable "in order to make the reason for my conclusions fully understood". Conclusions can mean nothing other than inferences drawn from the subordinate or evidentiary facts reviewed.

Again the court speaks of its findings (p. 37). See also page 38 where the statement is made, "if the master, as I *find*, actually regarded the proceedings covered by the bond, etc." The motion for rehearing also sets out certain findings of the court as grounds for rehearing and the court reiterated its findings by over-ruling the motion. We do not think that the technicality now raised, violative, as it is, of the understanding on which the case was tried, will prevail. As it has been raised, however, we feel free in this reply brief to go more fully into the questions of evidence raised by the bill of exceptions which questions were not fully discussed before because we believed our attack on the findings to be invulnerable.

The Brief of counsel for defendant in error requires little comment as it is substantially a repetition of the court's decision, the argument of which we think was fairly met in our former brief. In arguing on the validity of the bond, the counsel for defendant in error lays great emphasis upon the fact that the power given to the secretary by Section 5294 R. S. to remit fines and penalties may be exercised prior to trial as well as after and that if "plaintiff in error applied for a remission of penal-

ties \* \* \* \* a necessary implied power existed to take a bond to indemnify against loss that would follow a failure to seize and libel the vessel." As the whole case of defendant in error rests upon the implied power of the officials to take, not *a bond* to indemnify against loss, but *the* bond in question, it will be well to again review the elementary propositions of the law of agency. Counsel for defendant in error does not contend that there is an express authority in the collector of Customs or the secretary of Commerce and Labor to exact the bond in question or any bonds, but that such authority is "necessary" and therefore is implied. No such authority can be called necessary, as the doing of the authorized act to-wit: remitting fines or penalties, clearly does not require that a bond of any kind be given. The most that can be said for an implied power to exact a bond is not that such power is necessary but that it is convenient, customary or is a proper incident of the express authority. (See page 25 of our former brief). To repeat a statement in our former brief, even though for the sake of argument, it might be admitted that power to take a bond to indemnify against the loss that would follow a failure to seize and libel a vessel, is implied, yet it is a far different proposition to say that the secretary has implied power to exact a bond that will give himself the power and right to determine the question of liability and the extent thereof, a bond that will deprive an accused of his day in court and will oust the courts of jurisdiction to pass upon the question of the guilt or innocence of the accused and the nature or extent of his punishment. We may grant for the sake of argument that either before or after a vessel has been seized, it may be released upon giving a bond conditioned upon the



payment, not of such penalties as an executive officer may inflict or decide have been incurred, but of such fines as a court may impose. The president has full power of pardon and may pardon before or after conviction regardless of whether the punishment be fine or imprisonment, yet would any one argue that the president has an implied power to require a bond from an accused person conditioned to pay such penalties or undergo such punishment as the president should determine and that such a bond could be enforced regardless of the guilt or innocence of the accused, or that application for a pardon is a conditional admission of guilt. Again, when an individual stands accused of crime, he may be released upon a bond but not a bond conditioned upon the payment of such fine as an executive officer may determine. Is it a necessary, customary or proper incident of the secretary's power to remit penalties under Section 5294, of the Revised Statutes, that he have a power to exact from an applicant—(though we do not admit that the plaintiff in error in this case was an applicant for the remission of penalties)—a bond to secure the payment of such fines as the executive officer may impose?

The argument that the bond in question was not one to submit the question of whether a penalty had been incurred to the determination of the secretary of Commerce and Labor, but was an obligation to secure admitted penalties was fully covered in our former brief but we may add that the legal effect and interpretation of this document is a question of law so that the lower court's findings are entitled to no more weight than a decision upon a point of law. See *U. S. Trust Company v. Merchants Trust Co.*,

88 Fed. 140. We may repeat also that all the so-called evidence shows conclusively that the secretary was to determine whether any penalties had been incurred. As pointed out, the declaration is framed on this theory; the District Attorney, who drafted and approved the bond, argued that it was good as an arbitration (see p. 34 of the record); the collector of Customs thought it was his duty to impose and collect the fines (see his letter, "Exhibit 10") and the bond in his mind clearly was submitting the question of liability to the secretary of Commerce and Labor for arbitration; the report of the Grand Jury, which was made at the request of the Collector of Customs, states that it was made for the purpose of aiding the authorities at Washington in determining what, if any, penalties should be inflicted. The case was tried on the theory of law that was argued by the District Attorney and it was not until the court, after several months of labor, suggested the theory of a request for remission of admitted penalties, that the idea occurred to any of the executive officers who are now supposed to have intended and had this idea in mind from the beginning.

Leaving out of consideration the fact that the evidence does not in truth show a different intent from the wording of the bond, counsel's argument that a construction given by the parties is entitled to great weight overlooks the fact that to be admissible such interpretation or construction must be one adopted by both parties or adopted by one and acquiesced in by the other. How can the plaintiff in error be said to have acquiesced in the opinions expressed in the letter of Canavarro, the report of the Grand Jury, the letters of the Collector



of Customs and letters of the District Attorney when there is no evidence that the existence of such documents was ever known to him. All the authorities hold that the construction by one party to a contract not communicated to the other is not admissible when the effect of the contract is in controversy.

*Taft. V. Dickinson*, 6 Allen (Mass) 553.

*Richardson v. Hartford*, 149 N. Y. 307.

*Bay State v. Dougger*, 214 Mass. 166.

Again where parole evidence may be used it must be otherwise admissible, in other words must not be hearsay or opinion evidence unless of course it comes within some of the established exceptions.

Let us briefly examine the evidence submitted on the standpoint of admissibility aside from the objection that this evidence violates the rule against varying a written instrument by parole. For example admitting the letter from A de Souza Canavarro (exception No. 5 Error V.) addressed to Governor Frear, which letter discussed the deaths among the children of the immigrants on board the "Orteric" and the lack of sanitary precautions on this vessel, violated all the rules of evidence inasmuch as the letter is hearsay, was not made under oath, represents merely the opinion of the declarant concerning matters about which he had no personal knowledge or information other than hearsay. How can such a letter come within any of the hearsay exceptions or be used for any purpose, especially when it was not brought home to the plaintiff in error, Findlay, in any way. Again, the letters from the collector of Customs to the District Attorney cannot be regarded as binding on the defendant be-

low in any way. The extract from the report of the Grand Jury, which report was made at the suggestion of the District Attorney and the collector of Customs, was never brought home or called to the attention of the Master of the vessel and cannot be otherwise regarded than as rank hearsay. Again the letter of the collector of Customs (Exhibit 9) to the Secretary of Commerce and Labor enclosing the various letters representing the opinion of the Grand Jury, the Portuguese Consul, the District Attorney, etc., admitted over the objection of the plaintiffs in error was not in any way binding on the plaintiffs and did not tend in any way to interpret the bond in question.

Remembering that this evidence is what influenced the court in repudiating the language of the bond (see p. 28) it needs no argument to show that it was highly prejudicial to plaintiffs in error and should be grounds for reversal. It is evident that the opinion expressed in these letters and in this report of the Grand Jury so prejudiced the court that it was determined to hold the plaintiffs in error at all costs. In fact both the Secretary of Commerce and Labor and the trial judge quote at length from the report of the Grand Jury in condemning the master of the "Orteric."

The motion in arrest of judgment should have been granted. Counsel for defendant in error attempts to dispose of this question by stating that if the bond can be considered as a bond to pay admitted penalties, the complaint states a cause of action. The error in such argument is apparent. Motion in arrest of judgment goes to the sufficiency of the complaint and the evidence cannot be considered in granting or refusing a motion. *Bond v.*



*Dustin* 112 U. S. 604. The court below and counsel in his brief admitted that there is no authority "to pass up to the secretary of Commerce and Labor a determination of whether or not a penalty had been actually incurred." Let us examine the complaint along the lines of this admission and see whether it states a cause of action. The complaint recites the execution of the bond, the said bond being subject to a condition that if the principal shall pay to the United States of America, through the Collector of Customs at the port of Honolulu, "the amount which the department of Commerce and Labor of the United States shall upon such presentation of facts determine that the said principal is liable for on account of such penalties so alleged to have been incurred" the obligation shall be void. The complaint then states that the department of Commerce and Labor of the United States, through the secretary thereof, "*did determine* that the said James F. Findlay was liable to the United States of America for and account of certain penalties alleged to have been incurred by him as master of the British ship, "Orteric" on account of the alleged violations of the laws of the United States of America designated as the Passenger Act of 1882 as amended; and did on the 4th day of September, A.D. 1911, determine that the said liability on account of said violation did amount to the sum of \$7,960.00; that notice of the determination so made was given to the defendants and demand made for payment. The complaint concludes with the prayer for judgment for \$7,960.00 with interest thereon from the said 4th day of December. Note that the complaint demands interest from the 4th day of December, the date of the determination of the penalties by the

secretary. It is useless to repeat the discussion on pages 34 and 35 of our original brief. Certainly if the contention of defendant in error that the evidence proves that the bond was intended as one to pay admitted penalties there is a variance between the declaration and the proof.

### ESTOPPEL.

In our opening brief the question of estoppel is discussed, and we submit that the brief on behalf of the Government in no way meets the reasoning there presented.

The authorities referred to in the Government's brief all show the necessity for the elements of false representations of fact, the purpose of inducing the party seeking the estoppel to act, the falsity of the representations, the falsity of which is unknown to the party induced to act, and finally action by the party seeking the estoppel upon the representations to his own detriment. (See our opening brief pp. 35-36).

No misrepresentations of fact appear in the record. No purpose to induce the Government to act such as is required appears. There being no misrepresentations of fact, the Government cannot claim that it was misled. Likewise, for the same reason, the Government cannot be said to have acted to its detriment upon any such misrepresentations.

The only thing that can be said is that the master of the vessel was willing to, and did, give the bond in question to the Government, and that the Government was willing to, and did, accept the bond, and accordingly took no steps to seize the vessel or proceed against the master. We submit that the Government was quite as competent to judge of the



validity of the bond accepted by it as the master, and it cannot now claim that the bond, invalid as it is, is validated because its representatives failed to secure a proper bond. In other words, the representatives of the Government *exacted* an illegal and invalid bond, and it would be ridiculous to hold that having so done, the Government can now preclude the parties from showing that illegality and invalidity. Otherwise no bond whatever taken by the Government, however obviously invalid or defective, could ever be contested.

We submit that the Government occupies no better position than an individual party in a case such as this. If, instead of the Government, an individual had been the party claiming under the bond in question, we do not believe the argument of estoppel would even have been suggested.

What is it that the plaintiffs in error are estopped to deny? It can only be claimed that they are estopped to deny a matter which is purely and simply a question of law, the legality or illegality of the bond. The bond when accepted by the Government, spoke for itself, as it speaks for itself now. If it was an invalid bond when offered, when accepted, and when acted upon, it is an invalid bond now.

### CONCLUSION.

In the concluding remarks of counsel for the Government in his brief, an appeal is directed to the courts on the ground of convenience. Such an argument merits no reply. We simply refer the court to the quotation from *Sherlock vs. United States*, 43 Ct. of Cl. 161, on page 28 of our opening brief, which amply disposes of this argument.

To summarize, the decision of the court is clearly a special finding of facts. However, whatever may be the conclusion reached by the court on that point, the whole question of the liability of the plaintiffs in error is open to review by this court, on the question raised by the motion in arrest of judgment. If the complaint, which sets forth the bond in full, does not set forth a cause of action, it could not be remedied by any evidence that could be taken, and consequently irrespective of the judgment of the trial court, a reversal should follow. Again pure questions of law are raised by the exceptions to the admission of the evidence upon which the trial court relied in arriving at its conclusion, and we have we submit, demonstrated the errors committed in allowing this evidence, and again for that reason a reversal should follow. The only affirmative point raised by the Government, is that of estoppel, and we feel secure in our position that none of the elements of estoppel are to be found in this case.

We therefore submit that the judgment below should be reversed.

Respectfully submitted,

HENRY HOLMES,

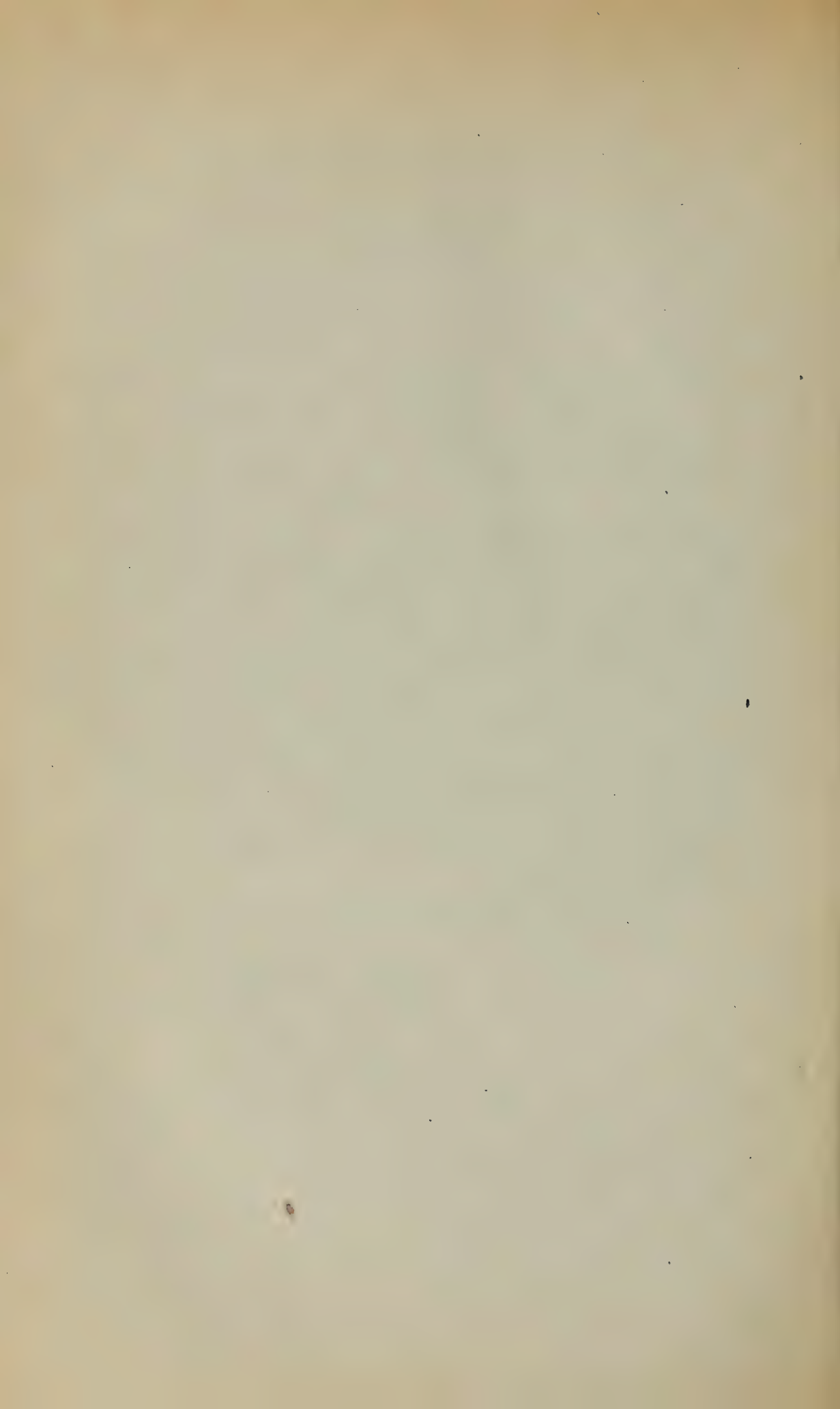
WILLIAM L. STANLEY,

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Attorneys for Plaintiffs in Error.

*S. H. Derby  
Of Counsel.*





No. 2511

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United States  
Circuit Court of Appeals

For the Ninth Circuit.

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JAS. F. FINDLAY, T. CLIVE DAVIES and  
W. H. BAIRD,

Plaintiffs in Error.

v.

UNITED STATES OF AMERICA,

Defendant in Error.

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**PETITION FOR RE-HEARING**

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Upon Writ of Error to the United States District Court of  
the Territory of Hawaii.

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HENRY HOLMES,  
CLARENCE H. OLSON,  
Attorneys for Plaintiffs in Error,  
Petitioners.

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Filed

AUG 8 1911





No. 2511

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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JAS. F. FINDLAY, T. CLIVE DAVIES and  
W. H. BAIRD,

Plaintiffs in Error.

v.

UNITED STATES OF AMERICA,

Defendant in Error.

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Upon Writ of Error to the United States District Court  
of the Territory of Hawaii.

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## PETITION FOR RE-HEARING

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Come now James F. Findlay, T. Clive Davies and W. H. Baird, the plaintiffs in error in the above entitled cause and respectfully petition this Honorable Court for a re-hearing of said cause for the following reasons, to-wit:

1. Because this Honorable Court in its decision in said cause held that the evidence of the negotiations and proceedings leading up to the giving of the bond upon which suit was brought in said cause was admissible upon the trial of said cause for the purpose of interpreting the sense in which the par-



ties to said bond understood the terms thereof and that there was no error committed in the admission of the same as evidence in said cause, whereas the terms of the said bond are clear and unambiguous and therefore the admission of the said evidence was in violation of the parol evidence rule.

2. Because this Honorable Court in its decision in said cause held that the evidence of the subsequent proceedings in presenting the facts contemplated by said bond, to the Department of Commerce and Labor was admissible upon the trial of said cause on the ground that it was a question for the trial court to decide whether the facts had been presented to the Department as provided in said bond, whereas neither the pleadings nor the issues in said cause involved any question concerning the presentation of facts to said Department, and further because the said evidence was actually and in fact relied upon by the trial court for the purpose of construing the said bond, whereas the terms of said bond are clear and unambiguous and therefore the admission of said evidence for the purpose of construing said bond was in violation of the parol evidence rule, and furthermore the same was relied upon by the trial court as a construction of the terms of the said bond by the parties thereto, whereas it does not appear that the plaintiffs in error or any of them had knowledge or are chargeable with notice of the matters so presented by the defendant in error to the said Department.

3. Because this Honorable Court in its decision in said cause held that the said bond was valid as a common law obligation on the ground that the Secretary of Commerce and Labor had jurisdiction in the exercise of his supervisory and revisory authority over the action of his subordinates to inquire and determine whether in his opinion the penalties of the statute had been incurred by said plaintiff in error James F. Findlay, and if they had been incurred, to direct proceedings in Court to be

taken for their recovery, whereas the condition and the only condition of the said bond provided for the payment of such amount as the said Department should determine the principal thereof was liable for on account of such penalties, and therefore by the terms thereof the said principal was excluded from and deprived of any defense in a court of law; that is to say, by its decision this Honorable Court while holding that the Secretary of Commerce and Labor had no authority to determine the amount of said penalties as a judicial question, held that the said bond contemplated a preliminary but not final determination of the said penalties for the purpose of prosecution, whereas the only condition of the said bond was the payment of the amount determined by the Secretary, thus depriving said plaintiff in error of any day in Court.

And your petitioners, said plaintiffs in error, therefore pray that an order be made for a rehearing of the said cause on a day to be appointed by this Honorable Court and upon such points as this Honorable Court may direct.

JAMES F. FINDLAY,

T. CLIVE DAVIES, and

W. H. BAIRD,

said Plaintiffs in Error.

By HENRY HOLMES,

CLARENCE H. OLSON,

their attorneys.



## CERTIFICATE.

I, CLARENCE H. OLSON, one of the attorneys for the above named petitioners and plaintiffs in error, hereby certify that in my judgment the foregoing petition is well founded and that it is not interposed for the purpose of delay.

CLARENCE H. OLSON.

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

EDWARD H. CHAVELLE, as Trustee in Bankruptcy of WASHINGTON STEEL & BOLT COMPANY, a Corporation, Bankrupt,

Appellant,

vs.

WASHINGTON TRUST COMPANY, a Corporation,

Appellee,

and

WASHINGTON TRUST COMPANY, a Corporation,

Appellant,

vs.

WASHINGTON STEEL & BOLT COMPANY, a Corporation Bankrupt and EDWARD H. CHAVELLE, as Trustee in Bankruptcy of WASHINGTON STEEL & BOLT COMPANY a Corporation, Bankrupt,

Appellees.

In the Matter of WASHINGTON STEEL & BOLT COMPANY, a Corporation, Bankrupt.

Transcript of Record.

Upon Appeals from the United States District Court for the Western District of Washington, Northern Division.

Filed

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F. D. Monckton

Clerk





**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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EDWARD H. CHAVELLE, as Trustee in Bankruptcy of WASHINGTON STEEL & BOLT COMPANY, a Corporation, Bankrupt,

Appellant,

vs.

WASHINGTON TRUST COMPANY, a Corporation,

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and

WASHINGTON TRUST COMPANY, a Corporation,

Appellant,

vs.

WASHINGTON STEEL & BOLT COMPANY, a Corporation, Bankrupt and EDWARD H. CHAVELLE, as Trustee in Bankruptcy of WASHINGTON STEEL & BOLT COMPANY, a Corporation, Bankrupt,

Appellees.

In the Matter of WASHINGTON STEEL & BOLT COMPANY, a Corporation, Bankrupt.

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**Transcript of Record.**

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Upon Appeals from the United States District Court for the Western District of Washington, Northern Division.

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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**Names and Addresses of Counsel.**

JAMES B. MURPHY, Esquire, Attorney for Appellant and Appellee, Washington Trust Company, 911 Lowman Building, Seattle, Washington.

J. W. RUSSELL, Attorney for Appellee and Appellant, Trustee in Bankruptcy, 714 Lowman Building, Seattle, Washington. [1\*]

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*In the District Court of the United States for the Western District of Washington, Northern Division.*

IN BANKRUPTCY—No. 4717.

In the Matter of WASHINGTON STEEL & BOLT COMPANY, a Corporation,

Bankrupt.

**Order Appointing Receiver.**

Upon the annexed petition of Standard Oil Company, Seattle Hardware Co. and Cataract Refining Mfg. Co. verified the 16th day of September, 1911, and the petition in bankruptcy filed herein against the above-named bankrupt, in the office of the Clerk of this Court on the 16th day of September, 1911, and upon the bond of your petitioner duly filed and approved herewith, and it appearing that a subpoena has been duly issued against said alleged bankrupt as required by law, and that the appointment of a receiver is absolutely necessary for the preservation of this estate, now on motion of attorney for the petitioning creditors herein,

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\*Page-number appearing at foot of page of original certified Record.



## IT IS ORDERED:

That Edward H. Chavelle, Esq., be and he hereby is appointed temporary receiver of the property, assets and effects of the above alleged bankrupt, with all the usual rights and powers thereof until the further order of this court, in the premises,

And it is further ordered:

That the said receiver give a bond to the people of the United States in the sum of Five Thousand Dollars conditioned for the faithful discharge of his duties as such receiver, and

It is further ordered:

That the said alleged bankrupt forthwith deliver to the said receiver all of its property, assets and effects now in its possession and under its control, and the said alleged bankrupt [2] and all other persons, firms, corporations, all creditors of the said alleged bankrupt, as well as its attorneys, agents and servants and all sheriffs, marshals and other officers, deputies and their employees, are hereby jointly and severally restrained and enjoined from removing, transferring or otherwise interfering with the property, assets and effects of the above-named alleged bankrupt, and from prosecuting, executing or suing out of any court any process, attachment, replevin or other writ for the purpose of taking possession, impounding or interfering with any property, assets or effects of the above-named alleged bankrupt, and from molesting, disturbing or interfering with the receiver herein appointed in the discharge of his duties.

C. H. HANFORD,  
District Judge.

[Endorsed]: Order Appointing Receiver. Filed in the U. S. District Court, Western Dist. of Washington. Sep. 18, 1911. F. A. Simpkins, Acting Clerk. [3]

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*In the District Court of the United States for the Western District of Washington, Northern Division.*

IN BANKRUPTCY—No. 4717.

In the Matter of WASHINGTON STEEL & BOLT COMPANY, a Corporation,  
Alleged Bankrupt.

**Order of Adjudication.**

At Seattle, in the said District, on the 16th day of September, 1911, before the Honorable C. H. Hanford, Judge of the said Court in Bankruptcy.

The petition of Standard Oil Company, a corporation of Seattle, King County, Washington, Seattle Hardware Company, a corporation of Seattle, King County, Washington and Cataract Refining & Manufacturing Company, a corporation of Buffalo, Erie County, New York, that the Washington Steel & Bolt Company, a corporation be adjudged a bankrupt within the true intend and meaning of the Acts of Congress relating to Bankruptcy, having been heard and duly considered, the said Washington Steel & Bolt Company, a corporation, is hereby declared and adjudged bankrupt accordingly.

Witness the Honorable C. H. Hanford, Judge of the said Court and the seal thereof, at Seattle, in said



district on the 19th day of September, 1911.

[Seal]

F. A. SIMPKINS,  
Acting Clerk.

Enter: C. H. Hanford,  
Judge.

[Endorsed]: Order of Adjudication. Filed in the  
U. S. District Court, Western Dist. of Washington.  
Sep. 19, 1911. F. A. Simpkins, Acting Clerk. [4]

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**[Order of Referee Approving Election of Trustee,  
etc.].**

*In the District Court of the United States for the  
Western District of Washington, Northern Divi-  
sion.*

No. 4717—IN BANKRUPTCY.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY, a Corporation,

Bankrupt.

This being the day appointed for the first meet-  
ing of creditors of which due notice has been given,  
the undersigned Referee of the said Court in Bank-  
ruptcy, sat, pursuant to such notice, to take the proof  
of debts and for the choice of trustee under the said  
bankruptcy and he does hereby certify:

That the creditors whose claims had been duly  
proven and were present or duly represented unani-  
mously elected Edward H. Chavelle, of Seattle in  
said district, as trustee of said bankrupt's estate and  
fixed the penalty of his bond in the sum of \$1000.00,  
which action was and is approved and this order made  
and filed accordingly.

Dated at Seattle, in said district, this 26th day of March, 1912.

JOHN P. HOYT,  
Referee in Bankruptcy.

[Endorsed]: Appointment of Trustee. Filed March 26th, 1912, 3 P. M. John P. Hoyt, Referee. Filed in the United States District Court, Western District of Washington. Dec. 8, 1914. Frank L. Crosby, Clerk. By B. E. Simpkins, Deputy. [5]

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**[Petition of The Washington Trust Company to  
Foreclose Mortgage.]**

*In the District Court of the United States, for the  
Western District of Washington, Northern Division.*

No. —. IN BANKRUPTCY.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY, a Corporation,  
Bankrupt.

Comes now The Washington Trust Company, a corporation, and shows this court:

1. That said The Washington Trust Company is a corporation organized under the laws of the State of Washington.

2. That on the first day of September, 1908, said bankrupt, Washington Steel & Bolt Company, a corporation, made, executed and delivered to the undersigned its first mortgage coupon bonds to the amount of Two Hundred Thousand (\$200,000.00) Dollars, and on the same date and simultaneously therewith, made, executed and delivered to said The Washing-



ton Trust Company its mortgage trust deed, upon all of its property, both real and personal, and all property which it should thereafter own, both real and personal, including the personal property which the trustee herein is seeking to obtain an order authorizing him to sell, which said mortgage trust deed was duly acknowledged so as to entitle the same to be recorded, and was thereafter duly filed and recorded in the auditor's office of Snohomish County, State of Washington, in Volume Sixty-nine (69) of Mortgages, at page Three Hundred Eighty-eight (388).  
[6]

3. That thereafter and prior to the time that said Washington Steel & Bolt Company became insolvent there was certified by said The Washington Trust Company and negotiated by said Washington Steel & Bolt Company \$53,100.00 of said bonds.

4. That the Bank of Montreal, a banking corporation, doing business at Spokane, Washington, is the owner and holder of \$47,900.00 par value of said bonds so issued and negotiated.

5. That said bonds provide for the payment of interest thereon at the rate of eight per cent per annum, payable semi-annually on the first days of March and September in each year; that said mortgage trust deed provided that in case default should be made by said Washington Steel & Bolt Company in the payment of the semi-annual interest on any of the bonds issued under this indenture, according to the tenor of the coupons annexed thereto as they severally became due, and if such interest shall remain unpaid, or in arrears for a period of six months, that

then and thereupon in every such case it shall be the duty of the trustee, upon a requisition in writing, signed by the holders of not less than one-third in amount of said bonds then outstanding, and being furnished with adequate security and indemnity against all costs, expenses and liabilities to be by it incurred, to proceed to enforce the rights of the bondholders under said trust deed, either by a suit or suits in equity or at law, in aid of the execution of such powers or otherwise as the trustee being advised by counsel shall deem most effectually to enforce such rights.

6. That the interest on said bonds held and owned by said Bank of Montreal as aforesaid has not been paid, and has not been due for more than six months prior to February 19, 1912. That the interest which became due on said bonds on March 1, 1912, has not been paid. [7]

7. That on February 19, 1912, the Bank of Montreal executed and delivered to your petitioner a written guarantee of indemnity against all costs, expenses and liabilities to be incurred by it in proceeding to enforce the right of said bondholders, and in writing requested and required your petitioner to proceed immediately to foreclose said mortgage deed of trust, and to enforce the rights of the bondholders under said indenture, according to the terms and provisions thereof.

8. That your petitioner has elected to proceed to foreclose said mortgage trust deed in a court of equity, in accordance with the terms and provisions thereof.



9. That the property included in said mortgage, both real and personal, is that tract or parcel of land with the buildings thereon erected, and all machinery connected with or attached to said buildings and property situated in the town of Edmunds, County of Snohomish, and State of Washington, together with all and singular the tenements, hereditaments and appurtenances belonging to said property, and the reversion, remainders, tolls, income, rent, issues, and profits thereof, including all chattels, fixtures, furnishings, machinery, tools, and every other estate, right, title and interest, property and appurtenances of said Washington Steel & Bolt Company, including the personal property for which trustee in bankruptcy herein is now seeking an order authorizing him to sell.

10. That the value of said property, all property of said bankrupt, both real and personal does not exceed the sum of \$————, and in the opinion of your petitioner said property will not sell for enough to satisfy said mortgage indebtedness.

WHEREFORE said The Washington Trust Company prays that it be granted an order by this Court authorizing and empowering [8] it to foreclose its said mortgage upon the real estate and personal property belonging to said bankrupt.

MURPHY, WALL and DANSON,

WILLIAMS and DANSON,

Attorneys for the Washington Trust Company.

State of Washington,

County of Spokane,—ss.

J. GRIER LONG, being first duly sworn, upon

oath deposes and says: That affiant is president of The Washington Trust Company above named, that he has read the foregoing petition, knows the contents therein contained, and that the same are true as he verily believes.

J. GRIER LONG.

Subscribed and sworn to before me this 30th day of July, 1912.

[Seal]

R. J. DANSON,

Notary Public for Washington, Residing at Spokane.

[Indorsed]: Petition: Filed August 14, 1912, 3 P. M.

JOHN P. HOYT,

Referee.

Filed in the U. S. District Court, for Western District of Washington. Dec. 30, 1912. Frank L. Crosby, Clerk. [9]

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**[Answer of Trustee to Petition to Foreclose  
Mortgage.]**

*In the District Court of the United States, for the  
Western District of Washington, Northern Division.*

No. 4717.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY, a Corporation,  
Bankrupt.

The trustee of Washington Steel & Bolt Company, a corporation, the bankrupt above named, an-



swering the answer and petition of The Washington Trust Company herein.

I.

Admits the allegations of paragraph I thereof.

II.

Denies, upon information and belief, the making, execution and delivery of the \$200,000.00 of bonds, or any part thereof, as alleged in paragraph II thereof.

III.

Admits that on the 1st day of September, 1908, the Washington Steel & Bolt Company made, executed and delivered what purported to be a mortgage upon certain real and personal property therein described, and purporting to cover any and all real and personal property thereafter acquired by it, and that such purported mortgage was recorded in Snohomish County, Washington, in Volume 69 of Mortgages, at page 388, as alleged in paragraph II thereof.

IV.

Denies each and every allegation of said paragraph II, except as hereinbefore expressly admitted or denied.

V.

Denies each and every allegation contained in paragraphs III and IV thereof.

VI.

Admits that certain bonds prepared by the Washington Steel & Bolt Company purported to bear interest at the rate of 8%, payable semi-annually [10] as alleged in paragraph V thereof.

VII.

Denies each and every other allegation contained

in said paragraph V thereof.

VIII.

Denies that he has any knowledge, or information sufficient to form a belief, as to the allegations contained in paragraphs VI, VII, and VIII thereof.

IX.

Denies each and every allegation contained in paragraph IX and X thereof.

X.

Admits the allegations of paragraph XI thereof.

And the trustee, further answering said answer and petition, and as affirmative matter, alleges:

I.

That no bonds were ever regularly issued by the Washington Steel & Bolt Company, as provided in and by the terms of said purported mortgage, and that all bonds purporting to be issued by said Washington Steel & Bolt Company thereunder were and are void.

II.

That in so far as said purported mortgage purported to embrace the personal property therein described, it permitted the mortgagor therein to sell and dispose of said personal property for its own benefit and was and is, by reason thereof, fraudulent and void.

III.

That by reason of there being no valid outstanding bonds secured thereby, said purported mortgage is a nullity.

Wherefore, the trustee prays for a decree herein decreeing that said purported mortgage is fraudulent



and void as to the personal property therein mentioned; that it is void as to future-acquired property, both real and personal; that all bonds purporting to have been issued [11] by the Washington Steel & Bolt Company pursuant to the provisions of said purported mortgage were and are void, and directing the same to be surrendered and cancelled; that said purported mortgage be decreed to be of no force and effect, and that the same be cancelled of record; and that the trustee have such other, further or different relief as shall be deemed meet and equitable.

J. W. RUSSELL,

Attorney for Trustee in Bankruptcy.

State of Washington,

County of King,—ss.

Edward H. Chavelle, being duly sworn, deposes and says that he is the Trustee in Bankruptcy herein; that he has read the foregoing answer, knows the contents thereof, and believes the same to be true.

EDWARD H. CHAVELLE.

Subscribed and sworn to before me this 15th day of April, A. D. 1913.

[N. S.]

O. L. WILLITT,

Notary Public in and for the State of Washington,  
Residing at Seattle.

Receipt of a copy of the within answer and due service thereof, is admitted this — day of April, 1913.

JAS. B. MURPHY. (E. K.)

DANSON, WILLIAMS & DANSON.

(E. K.)

Attorneys for Petitioner.

[Endorsed]: Answer of Trustee to Answer and Petition of the Washington Trust Company. Filed April 25th, 1913. 2 P. M. John P. Hoyt, Referee. Filed in the United States District Court, Western District of Washington, Jul. 9, 1913. Frank L. Crosby, Clerk. By ———, Deputy. [12]

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*In the District Court for the State of Washington,  
Northern Division.*

No. 4717.

In the Matter of the WASHINGTON STEEL AND  
BOLT COMPANY, a Corporation,  
Bankrupt.

**Reply [to Answer of Trustee to Petition to Foreclose  
Mortgage].**

Comes now the Washington Trust Company and for reply to the answer of the Trustee of the Washington Steel & Bolt Company, a Corporation, denies and says as follows:

I.

Referring to the first paragraph of the further affirmative answer, it denies each and every allegation therein contained.

II.

Referring to paragraph II of the affirmative matter set out in said answer, it denies each and every allegation therein contained.

III.

Referring to paragraph III of said affirmative matter, it denies each and every allegation therein contained.



WHEREFORE, Having fully replied to said affirmative matter, the Washington Trust Company prays as it has heretofore prayed in its petition herein.

JAMES B. MURPHY,  
Attorney for Washington Trust Company.

State of Washington,  
County of King,—ss.

James B. Murphy, being first duly sworn, upon oath deposes and says: That he is attorney for the petitioner herein, the Washington Trust Company; that he has heard the foregoing reply read, knows the contents thereof and believes the same to be true; that he makes this affidavit for and on behalf of this petitioner because it is a corporation and has no officer in King County, State of Washington, to verify a pleading. [13]

JAMES B. MURPHY,

Sworn and subscribed to before me this 21st day of April, 1913.

ROBERT BOOTH,  
Notary Public in and for the State of Washington,  
Residing at Seattle.

Copy of within Reply received and due service of same acknowledged this 21st day of April, 1913.

J. W. RUSSELL,  
Attorney for Trustee of Wash. Steel & Bolt Co.

[Endorsed]: Reply. Filed April 25th, 1913, 2 P. M. John P. Hoyt, Referee.

[Endorsed]: Filed in the United States District Court, Western District of Washington, July 9, 1913. Frank L. Crosby. By Deputy. [14]

**[Opinion of Referee Filed November 26, 1912, on  
Petition to Foreclose Mortgage, etc.]**

*In the District Court of the United States, for the  
Western District of Washington, Northern Di-  
vision.*

No. 4717.—IN BANKRUPTCY.

In the Matter of the WASHINGTON STEEL &  
BOLT COMPANY, a Corporation,  
Bankrupt.

**MEMORANDUM OF DECISION.**

The petitioner, the Washington Trust Company, seeks leave to foreclose its mortgage outside the bankruptcy proceeding, and in the opinion of the undersigned is entitled to such leave if, in view of the principles of equity, it can do so without injury to the rights of other interested parties. The facts show that soon after adjudication the bankruptcy court, by its proper officers took possession of all the assets belonging to said bankrupt estate, practically the whole of which is claimed by the mortgagee to be covered by its mortgage. The property so taken possession of was of such a nature that it required attention to preserve it. The possession so taken has remained in the Bankruptcy Court to this day, and for many months after possession was taken no question was made or objection raised on the part of the mortgagee or any other person interested to the retention of such possession by the officers of the Bankruptcy Court, and no demand whatever was made by or in behalf of said mortgagee to secure possession of the property or the right to control the



same until the filing of its petition herein, asking for leave to foreclose as hereinbefore stated. During all this time the safety of the property in question required the services of a watchman, the expenditure of money for light and water required in the care of the property and the attention of the receiver and the trustee in looking after the same and seeing to it that, so far as the assets in his hands would allow, the property was properly watched and cared for. Under these circumstances the undersigned is of the opinion that equity requires that the mortgagee, before being allowed to foreclose its mortgage outside of the bankruptcy proceeding or take possession of the property, should be required to pay the reasonable expenses incurred in so caring for the property, by or in behalf of the receiver or trustee. The services so required, if reasonably compensated for, will amount to [15] a large sum and it is unfortunate for all concerned that circumstances have seemed to make it necessary for the property to have been retained in the possession of the Bankruptcy Court so long as it has. However, so far as the undersigned is advised, no fault can be charged to the receiver or trustee on account of such delay. In the opinion of the said undersigned the mortgagee should be required to assert its rights in the Bankruptcy Court and pay such a proportion of the expenses incident to the care of the property and the supervision thereof as may be found to be equitable or, if it desires to proceed to foreclose the mortgage outside the bankruptcy proceeding it should pay into the hands of the trustee for disbursement to those

interested a fair compensation under all the circumstances for the services of the watchman and others in looking after the property, the water and light bills which have been incurred, and some compensation to the receiver and to the trustee for supervising those engaged in the care of the property. As to what amount should be required to be paid is a difficult matter to determine. The property was so situated that it was difficult to provide for its care and the receiver and the trustee have been at a disadvantage in providing for such care by reason of the fact that neither of them had any funds in his hands with which to insure those employed proper compensation. The liabilities incurred, if estimated at the price agreed to be paid by the receiver or trustee, would amount to at least \$1400.00, and the receiver and trustee should be allowed at least \$200.00 for looking after the matter and after reducing these claims to the minimum they will amount to at least \$1200. The prayer of the petitioner will be granted upon condition that he pays to the trustee for the benefit of the estate the sum of Twelve Hundred Dollars (\$1200). Otherwise, said petition will be denied. It was suggested upon argument that the Referee indicate what expenses would be charged against the mortgagee in the bankruptcy proceeding if it elected to remain therein and have its mortgage there foreclosed. The Referee finds it impossible to announce beforehand what equity will require for the reason that the facts upon which the adjustment must be made cannot now be determined. All that can properly be stated at this time is that the general



expenses of administration will not be charged [16] against the mortgagee but only its proportion of the necessary expenditures for the care of the property and the costs and expenses incident to the sale thereof.

An order may be prepared and submitted in accordance with the foregoing.

Dated at Seattle, in said District, this 26 day of November, 1912.

JOHN R. HOYT,  
Referee in Bankruptcy.

[Endorsed]: Memorandum of Decision. Filed Nov. 26th, 1912, 3 P. M. John P. Hoyt, Referee. Filed in the United States District Court, Western District of Washington. Dec. 30, 1912. Frank L. Crosby, Clerk. [17]

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**[Order of Referee Re Petition of Washington Trust  
Co. to Foreclose Mortgage.]**

*In the District Court of the United States, for the  
Western District of Washington, Northern Di-  
vision.*

No. 4717.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY,

Bankrupt.

PETITION.

This cause coming on to be heard upon the petition of the Washington Trust Company for leave to foreclose its mortgage outside the bankruptcy proceeding, and the Referee being fully advised in the prem-

ises, delivered a written opinion herein on the 26th day of November, 1912, and in pursuance of said written opinion, it is considered:

I. ORDERED AND DECREED by the Referee that the prayer of the petitioner be granted upon the condition that it pay to the Trustee for the benefit of said estate the sum of Twelve Hundred Dollars (\$1200); otherwise said petition will be denied, and it is further

II. ORDERED AND DECREED That the said Washington Trust Company pay to Edward H. Chavelle, Trustee in Bankruptcy, for the benefit of said bankrupt estate the sum of twelve hundred dollars (\$1200) on or before the 26th day of December, 1912, and in the event that said sum is not paid, then and in that event the petition of the Washington Trust Company to foreclose its mortgage outside the bankruptcy proceeding is hereby denied. That the Washington Trust Company hereby excepts to Paragraph I and II of this order and to the whole and every part of each of said paragraphs, and its exception hereby allowed.

Dated at Seattle in said State and District this 19th day of December, 1912.

JOHN P. HOYT,  
Referee in Bankruptcy. [18]

[Indorsed]: Order as to payment of certain expenses, etc. Filed the 19th day of December, 1912, 11 A. M. John P. Hoyt, Referee.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Dec. 30, 1912. Frank L. Crosby, Clerk. By Deputy. [19]



*In the District Court of the United States, for the  
Western District of Washington, Northern Di-  
vision.*

No. 4717.

In the Matter of the WASHINGTON STEEL &  
BOLT COMPANY,

Bankrupt.

**Petition [for Review of Order of Referee of  
December 19, 1912, etc.].**

**PETITION.**

To the Honorable John P. Hoyt, Esq., Referee in  
Bankruptcy:

Your petitioner, the Washington Trust Company  
respectfully shows as follows:

**I.**

That it is a corporation duly organized under the  
laws of the state of Washington and that it has  
paid all license fees required of it and especially the  
last license fee required of it by the State of Wash-  
ington.

**II.**

That heretofore it filed its petition herein asking  
leave to foreclose its mortgage in the District Court  
of the United States for the Western District of  
Washington, Northern Division, which petition is  
hereby referred to and your petitioner asks that it  
be read in connection with this petition.

**III.**

That a hearing was had upon said petition and  
thereafter, to wit, on the 26th day of November, 1912,

the Referee rendered a memoranda decision upon said petition and thereafter a formal order was entered on the 19th day of December, 1912, requiring the petitioner to pay to the Trustee of the above-entitled bankrupt the sum of Twelve Hundred (\$1200.00) Dollars as a condition precedent to his right to foreclose his mortgage in said District [20] Court, which memoranda decision and order is hereby referred to to save repetition.

#### IV.

That your petitioner feels itself aggrieved by the said order and desires the correctness of said order reviewed by the Judge of the District Court of the United States for the Western District of Washington, Northern Division, and your petitioner contends that the said order is erroneous and that the Court committed error in the following particulars:

(a) That the Court erred in finding that the Washington Trust Company made no objection and raised no question as to the retention of said property until the filing of its petition herein asking for leave to foreclose the mortgage, it being the contention of your petitioner that the proofs offered showed that immediately upon the appointment of a Trustee, it concerned itself regarding the property and was awaiting and abiding the pleasure of the Receiver and Trustee and giving the Receiver and Trustee an opportunity to carry out some plan regarding the property which would inure to the benefit of the general creditors.

(b) That the Court erred in the opinion that equity required your petitioner under all circumstances be-



fore being allowed to foreclose its mortgage outside of the bankruptcy proceedings or take possession of the property, to pay the reasonable expense incurred in caring for the property by or in behalf of the receiver or trustee.

(c) The Court erred in the opinion that your petitioner should be required to assert its rights in the bankruptcy court and pay such proportion of the expenses incident to the care of the property and the supervision thereof as may be found equitable and pay into the hands of the trustee for disbursement fair compensation [21] for a watchman to watch the property described in the said mortgage or compensation for supervision of the same, it being the contention of your petitioner that the trustee in taking charge of the said property stepped into position of the mortgagor and that whatever he may have done in connection with the said property, must necessarily have been done to protect any equity that he may have believed that the trustee or receiver possessed in favor of general creditors and that he was at no time authorized or justified in expending or laying out money upon said property for the use and benefit of the mortgagee, this petitioner.

(d) The Court erred in holding that liabilities incurred in connection with the keeping of the said property amounted to \$1400.00 and erred in holding that the trustee be allowed \$200.00 for looking after the matter and erred in holding that \$1200.00 was the minimum which should be allowed for the above items and in granting the prayer of the petitioner upon condition that the trustee pay for the benefit

of the estate the sum of Twelve Hundred (\$1200.00), it being the contention of the petitioner that the said items are improperly charged against the property and made a prior claim to said mortgage.

(e) The Court erred in rendering order on December 19th, 1912, granting the prayer of your petitioner upon the payment of Twelve Hundred (\$1200.00) Dollars and further ordering that if said sum is not paid, the petition will be denied and the Court further erred in ordering that your petitioner pay to Edward H. Chavelle, trustee in bankruptcy, the sum of Twelve Hundred (\$1200.00) Dollars on or before the 26th day of December, 1912; and in further providing that if the said sum is not paid the petition for the foreclosure of the mortgage would be denied; it being the contention of your petitioner that the trustee should have abandoned [22] the property to the mortgagee when it was ascertained that it was not sufficient to pay the mortgage debt and that the rights of the trustee were no greater than the rights of the mortgagor and that in no event should there be any costs or charges imposed upon the said property as against the said mortgage which would exceed the ordinary costs in a foreclosure case in the said court providing the mortgage be foreclosed in said bankruptcy proceedings or sold by the trustee, it being the contention of your petitioner that the court should under the circumstances have ordered the trustee to have abandoned the property to the mortgagee, your petitioner in the event that it desired to foreclose its mortgage outside of the bankruptcy proceedings and if it fore-



closed its mortgage in the bankruptcy proceedings, then to be subject only to the ordinary disbursements incident to a foreclosure in a suit in a court of equity.

WHEREFORE, Your petitioner respectfully prays that the usual record of the proceedings had pursuant to said petition, including the petition and all its exhibits and the transcript of the testimony taken down and used in connection therewith and the final order entered therein on December 19th, 1912, to be certified for review to the District Court of the United States for the Western District of Washington, Northern Division.

JAMES B. MURPHY,  
Attorney for Petitioner.

United States of America,  
District of Washington,—ss.

I, James B. Murphy, attorney for petitioner mentioned and described in the foregoing petition, do make solemn oath and state that the foregoing petition is true according to the best knowledge, information and belief of affiant and further certifies that he believes that the petition in his opinion is well founded in points [23] of law and that it is not interposed for delay.

JAMES B. MURPHY.

Subscribed and sworn to before me this 27th day of December, 1912.

[Seal] H. A. OWEN, Jr.,  
Notary Public in and for the State of Washington,  
Residing at Seattle, Wash.

[Indorsed]: Petition. Filed Dec. 28th, 1912,  
11 a. m. John P. Hoyt, Referee.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Dec. 30, 1912. Frank L. Crosby, Clerk. By \_\_\_\_\_, Deputy. [24]

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**[Opinion, Filed February 7, 1913, Affirming Opinion  
of Referee Denying Petition to Foreclose Mort-  
gage, etc.]**

*United States District Court, Western District of  
Washington, Northern Division.*

No. 4717.

Filed Feb. 7, 1913.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY, a Corporation,  
Bankrupt.

JAMES B. MURPHY, for Petitioner.

EDWARD H. CHAVELLE, Trustee.

(By the Court.)

The Washington Steel & Bolt Company has heretofore been adjudged a bankrupt in this Court. At the time of the adjudication the greater part of the property and assets of the bankrupt was subject to a mortgage in favor of the Washington Trust Company, to secure certain bonded indebtedness. The validity of this mortgage is admitted in part, but there is a dispute between the trustee in bankruptcy and the mortgagee as to the property actually covered by the mortgage, and also as to the validity of the mortgage as to certain personal property included therein, because the mortgage was not filed



or recorded as a chattel mortgage, as required by the local laws of the State. The mortgagee has petitioned the Court for leave to foreclose its mortgage outside of the bankruptcy court and the referee has granted such leave only upon condition that the mortgagee first pay to the trustee the sum of \$1,200.00, to cover the expenses of the trustee in looking after and conserving the mortgaged property while in his custody as receiver and trustee of the bankruptcy court. The mortgagee objected to the condition [25] imposed, and the case is now here on a petition to review the referee's decision.

Under the provisions of the bankruptcy act, the trustee in bankruptcy is vested with no better right or title to the property of the bankrupt than belonged to the bankrupt himself at the time of the adjudication. He takes mortgaged property subject to the lien of the mortgage and is only concerned with, or interested in, the equity of redemption, provided the validity of the mortgage itself is not questioned. If the equity of redemption is of any value it should be administered for the benefit of the general creditors and at their expense, but if of no value the trustee should not concern himself or incur any expense in connection therewith. The lien of a mortgage cannot be displaced by charges such as are here made, unless the expenses are incurred with the consent of the lien holder, or unless the lienholder has estopped himself by his conduct from objecting thereto. These principles are elementary and the Court does not deem it necessary at this time to determine whether there was such consent or estoppel, as

these questions may not arise again. There is, in the opinion of the Court, other valid reasons why leave to foreclose should not be granted at this time. As already stated, there is a dispute as to the property actually covered by the mortgage and as to the validity of the mortgage of the personal property, and these disputes should be settled and determined in the bankruptcy court. They can be settled here more speedily and at less expense to the parties than in any other forum, and it is the general policy of the law to discourage useless and unnecessary litigation. Either party may apply to the court or referee on the pleadings already filed, for a determination of all questions relating to the scope and validity [26] of the mortgage, and when these questions are determined, the trustee must elect whether he will administer the equity of redemption for the benefit of the general creditors, or surrender the mortgaged property to the mortgagee for foreclosure. If he elects to administer the equity of redemption he must do so at the expense of the general creditors and in such a manner as not to unduly hamper or delay the mortgagee in the collection of its debt. When these questions are settled the court will determine, if need be, the validity of the expense charges made against the mortgagee. We do not understand that the referee decided that these charges are legal obligations against the mortgagee, but if so, that part of his decision will not be controlling upon the Court should the questions arise at some later stage of the proceedings. In so far as the decision of the referee denied leave to the mortgagee to foreclose at this



time, the order is affirmed, but without prejudice to the right to renew the application at a later day under changed conditions.

[Indorsed]: Memorandum Decision. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Feb. 7, 1913. Frank L. Crosby, Clerk. By B. O. Wright, Deputy. [27]

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*In the District Court of the United States for the  
Western District of Washington, Northern  
Division.*

No. 4717.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY, a Corporation,

Bankrupt.

**Order [Denying Petition for Leave to Foreclose  
Mortgage, etc.].**

BE T REMEMBERED, that this matter came on duly and regularly for hearing upon the petition for a review from the decision of the Honorable John P. Hoyt, Referee in Bankruptcy, and after argument of counsel, the matter was submitted to the Court for its consideration and determination, and the Court heretofore, to wit, on the 7th day of February, 1913, after having duly considered the said cause, filed a memoranda decision herein;

Now, therefore, it is hereby ordered that the petition of the Washington Trust Company for leave to foreclose its mortgage against the property and assets of the bankrupt outside of the bankruptcy court be and the same is hereby denied at this time, but

without prejudice to the right to renew the application at a later date under changed conditions.

And, it is hereby further ordered that this proceeding be and the same hereby is referred back to the referee, to proceed in accordance with the memoranda decision on file herein, and said referee is hereby directed, upon the application of either party, to determine all questions relative to the scope and validity of said mortgage, and of the bonds secured thereby, under the pleadings already filed herein, and as the same have been heretofore or may be hereafter amended, and when these questions are settled the referee will determine, if need be, the validity of the expense charge made against the mortgage.

And, it is hereby further ordered that when such questions have been determined, the trustee must elect whether he will administer [28] the equity of redemption for the benefit of the general creditors, provided said mortgage and bonds are held valid, or surrender the mortgaged property to the mortgagee for foreclosure.

Done in open court, this 3d day of March, 1913.

O. K. Murphy.

CLINTON W. HOWARD,

Judge.

Service of the within Order by delivery of a copy to the undersigned is hereby acknowledged this 3d day of Mar., 1913.

JAMES B. MURPHY.

[Indorsed]: Order. Filed in the United States District Court, Western District of Washington,



Mar. 3, 1913. Frank L. Crosby, Clerk. By B. O. Wright, Deputy. [29]

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**[Opinion of Referee, Filed May 15, 1913.]**

*In the District Court of the United States for the  
Western District of Washington, Northern Division.*

No. 4717.—IN BANKRUPTCY.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY, a Corporation,  
Bankrupt.

**MEMORANDUM OF DECISION.**

It is contended on the part of the Trustee that the mortgage in question and the bonds sought to be secured thereby are void by reason of the fact that the statutes of the State, in force at the time of the execution of the mortgage, did not authorize such private corporations to issue bonds like those here involved and secure the same by a mortgage on its property. Without expressing any opinion as to the merits of this contention the Referee for the purposes of this decision will assume that the law authorized the issue of such bonds and the mortgaging of property to secure the same. Has the evidence introduced upon the hearing shown such action on the part of the bankrupt corporation in the execution of such mortgage, and of the issue of bonds secured thereby as to require the Court to give them force? The Referee has doubts as to whether or not authority for the execution of the mortgage by the officers who executed it has been sufficiently shown.

The certified copy of the mortgage offered in evidence furnished no higher proof of the regularity of its execution than would the original mortgage had it been put in evidence. Either the certified copy or the original mortgage was sufficient to establish the fact that the mortgage was executed by the officers as shown upon its face, and the admission of this fact is all that the Referee is able to find in the answer of the Trustee. But it may well be doubted whether the fact that the officers executed the paper is sufficient to show that they had been authorized so to execute it by proper [30] action on the part of the Board of Trustees of the corporation. The presumption of authority, if any, which flowed from the fact of the execution was in no way aided by any evidence introduced upon the hearing. The Referee finds it unnecessary to decide this question for the reason that he is satisfied that under the special Order of Reference under which he is acting it was his duty to determine not only the legality of the execution of the mortgage as such, but also whether or not the bonds had been so issued as to bring them within the terms of the mortgage and make it a security for their payment. If no bonds had ever been issued to be secured by the mortgage, then the mortgage after the bankruptcy of the corporation would cease to be of any force whatever. Therefore to determine whether or not it is effective as a lien upon the property in the hands of the Trustee it is necessary to decide as to the legality of the issue of the bonds which have been sought to be



issued and under the terms of the mortgage to be secured thereby.

In the opinion of the Referee the evidence offered upon the hearing was not sufficient to show that any of these bonds had ever been regularly issued under the terms of the mortgage. The only evidence tending to show that any bonds had been issued was to the effect that \$20,000.00 of them had been delivered to the President of the corporation in payment of a pre-existing debt owing to him by the corporation, and that between \$20,000.00 and \$30,000.00 more had been issued to the Bank of Montreal as collateral security for a pre-existing debt owing to the bank by the corporation. No resolution of the Board of Directors authorizing the issuance and negotiation of these bonds for the purposes for which they were issued was in any manner shown either by the records of the corporation, or by oral evidence. This being so, the Referee is compelled to hold that authority for the issue and negotiation of the bonds as above stated was not shown. To hold that the President of the corporation could [31] without authority from the Board of Directors take the bonds of the Company as his own for a debt already existing would be equivalent to allowing him without being authorized so to do to convert his unsecured claim into a secured one. And to hold that any officer of the bankrupt could negotiate the bonds for the purposes of collateral security without express authority would in the opinion of the Referee contravene an elementary rule as to the powers of the officers of a corporation. It follows that in the opinion of the

Referee the validity of the mortgage has not been established. Findings and conclusions as herein suggested may be prepared and submitted.

Dated at Seattle, in said District, this 15th day of May, 1913.

JOHN P. HOYT,  
Referee in Bankruptcy.

[Indorsed]: Memorandum of Decision. Filed May 15th, 1913. 1 P. M. John P. Hoyt, Referee.

[Indorsed]: Filed in the United States District Court, Western District of Washington, July 9, 1913. Frank L. Crosby, Clerk. By Deputy. [32]

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*In the District Court of the United States for the  
Western District of Washington, Northern  
Division.*

No. 4717—IN BANKRUPTCY.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY, a Corporation,

Bankrupt.

**Order Denying Petition for Leave to Foreclose.**

The Washington Trust Company, a corporation, having filed its petition herein for leave to foreclose an alleged mortgage executed by the bankrupt; and the Trustee in Bankruptcy having filed his answer to said petition; and the Referee in Bankruptcy having made an order allowing said The Washington Trust Company leave to foreclose its said alleged mortgage upon condition, as specified in said order, which said order was made by the Referee in Bank-



ruptcy without passing upon the validity of either said alleged mortgage or the bonds issued thereunder; and said petitioner having taken said order to the District Court for review; and the said District Court having referred the matter back to the Referee in Bankruptcy for the purpose of having the validity of said alleged mortgage and of the said bonds determined upon the pleadings as they then existed or might be thereafter amended; and the Trustee in Bankruptcy having duly filed an amended answer to said petition; and the petitioner having replied thereto; and the issues raised by said petition, amended answer, and reply having been brought on for hearing before the Referee in Bankruptcy on the 25th day of April, 1913; and the Referee in Bankruptcy having heard the proofs and allegations of the parties; and the Referee in Bankruptcy having duly made and filed his memorandum of decision herein; Now, on motion of J. W. Russell, attorney for the Trustee in Bankruptcy herein; [33]

IT IS ORDERED that the petition of the said The Washington Trust Company be, and the same hereby is denied, upon the ground and for the reason that said purported mortgage and the outstanding bonds purporting to be issued thereunder are, and each of them is, null, void, and of no effect.

JOHN P. HOYT,

Referee in Bankruptcy.

To all of which petitioners except and its exception is allowed.

JOHN P. HOYT,

Referee.

Receipt of a copy and due service hereof admitted this 20th day of May 1913.

J. B. MURPHY,  
Attorney for Petitioner.

[Indorsed]: Order Denying Petition for Leave to Foreclose. Filed June 16, 1913. 10 P. M. John P. Hoyt, Referee.

[Indorsed]: Filed in the United States District Court, Western District of Washington, July 9, 1913. Frank L. Crosby, Clerk. By Deputy. [34]

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*In the District Court of the United States for the  
Western District of Washington, Northern Division.*

No. 4717.

In the Matter of the WASHINGTON STEEL &  
BOLT COMPANY, a Corporation,  
Bankrupt.

**Petition for Review [of Opinion Filed May 15, 1913,  
and Order of June 17, 1913, etc.].**

To the Honorable JOHN P. HOYT, Referee in Bankruptcy:

Your petitioner, the Washington Trust Company, feeling itself aggrieved by the opinion rendered herein on May 15, 1913, denying its petition for leave to foreclose its mortgage, and by orders entered on June 17, 1913, denying petitioner's motion for a new trial and adjudging the mortgage of the Washington Trust Company null and void, hereby petitions for a review of said matter by the above-entitled court



and the Judge thereof, and as grounds for said review your petitioner represents as follows:

(1) That a hearing was had upon said petition and thereafter, on the 15th day of May, 1913, the Referee rendered a memoranda decision upon said petition, and that thereafter a motion for a new trial was made, supported by certain affidavits, and a hearing had upon the said motion for a new trial or re-hearing, and that thereafter, on the 17th day of June, 1913, a formal order was entered by said Referee denying the motion for a new trial and adjudging the mortgage referred to in the petition of the Washington Trust Company as null and void and of no effect, and denying the petition of the Washington Trust Company for leave to foreclose its said mortgage, to which and all of which your petitioner duly reserved and preserved an exception. [35]

(2) That your petitioner feels itself aggrieved by said order and desires the correctness thereof, and of each of said orders, and opinions, reviewed by the Judge of the District Court of the United States for the Western District of Washington, Northern Division, and your petitioner contends that the said decision and orders are erroneous and that the Referee permitted error in the following particulars:

(a) That the Court erred in holding that it was necessary to show authority and that no authority was shown for the execution and delivery of the said mortgage, it being the contention of this petitioner that the allegations as to the execution of the mortgage and bonds were admitted, and that the regu-

larity of the execution of the mortgage and bonds (so far as the formal execution and delivery thereof was concerned), and the proceedings leading up thereto was unquestioned and conceded upon the trial of said cause and the argument thereof.

(b) That the Referee erred in finding that the bonds were not duly and regularly issued for value.

(c) That the Referee erred in failing to find that the said mortgage and bonds, and especially the bonds, had passed into the hands of innocent parties for value.

(d) That the Referee erred in his refusal to grant a new trial and a rehearing of said matter, and in refusing to give petitioner an opportunity of supplementing the testimony already in.

(e) That the Referee erred in entering an order adjudging and decreeing the said mortgage and bonds null and void, the contention of the petitioner being that there was testimony sufficient to make a *prima facie* case showing that the mortgage and bonds were valid and binding, and, furthermore, that there was no testimony tending to show that the mortgage was void; the most that could be said, in any event, was that there was a failure of proof, and no [36] affirmative showing of the invalidity of the mortgage.

(f) The Referee erred in denying the prayer of the petition of the said Washington Trust Company;

Wherefore, your petitioner respectfully prays that the usual record of the proceedings had pursuant to said petition, including said petition, all exhibits and a transcript of the testimony taken down and used in



connection therewith, and the final orders entered herein on June 17, 1913, be certified for review to the United States District Court for the Western District of Washington, Northern Division, for such proceedings as the Court may deem proper.

JAMES B. MURPHY,  
Attorney for the Washington Trust Company. [37]

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*In the District Court of the United States for the  
Western District of Washington, Northern Division.*

No. 4717.

In the Matter of the Washington STEEL & BOLT  
COMPANY, a Corporation,  
Bankrupt.

[**Affidavit of James B. Murphy Re Petition for  
Review, etc.**]

State of Washington,  
County of King,—ss.

I, James B. Murphy, Attorney for the Petitioner mentioned and described in the foregoing petition, do make solemn oath and state that the foregoing petition is true according to the best knowledge, information and belief of affiant, and further certifies that the said petition, in his opinion, is well founded in point of law, and that it is not interposed for delay.

JAMES B. MURPHY.

Subscribed and sworn to before me this Nineteenth day of June, 1913.

JNO. R. WILSON,  
Notary Public in and for the State of Washington,  
Residing at Seattle, said County and State.

Receipt of copy of the within Affidavit and Petition for Review acknowledged and a true copy received this 20th day of June, 1913.

J. W. RUSSELL,  
Attorney for Trustee in Bankruptcy.

[Indorsed]: Affidavit and Petition for Review. Filed June 20th, 1913, 2:00 P. M. John P. Hoyt, Referee. Filed in the United States District Court, Western District of Washington, July 9, 1913. Frank L. Crosby, Clerk. By Deputy. [38]

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**[Opinion of Neterer, D. J., Filed September 22, 1913.]**

*United States District Court, Western District of Washington, Northern Division.*

No. 4717.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY,

Bankrupt.

(Filed Sept. 22, 1913.)

JAMES B. MURPHY, for Petitioner.

J. W. RUSSELL, for Trustee.

NETERER, District Judge.

This matter is before the Court on the petition of the Washington Trust Company, in which it states in substance that on the 9th day of September, 1908, the



Washington Steel & Bolt Company, a corporation, executed and delivered its first mortgage coupon bonds to the amount of \$400,000, and on the same day and simultaneously therewith made, executed and delivered its mortgage upon all of its property both real and personal, and all property which it should thereafter own or acquire, including real and personal; that the mortgage was recorded in the auditor's office in Snohomish County, Washington; that thereafter and prior to insolvency there was certified by the Washington Trust Company and negotiated by the bankrupt \$53,100 of the bonds; that the Bank of Montreal, a corporation doing business in Spokane, is the owner of \$47,900 of said bonds; that the bonds provide for the payment of interest at 8% per annum, payable semi-annually, the dates of payment being March 1st and September 1st; that the deed provided upon default in interest for a period of six months and a request in writing signed by not less than one-third of the owners of bonds outstanding and the furnishing of adequate security for costs and expenses, that the Trust Company should proceed to enforce the rights of the [39] bondholders under the mortgage; that default has been made upon the interest for more than six months; that the bank of Montreal had indemnified the Washington Trust Company against costs and expenses, and had directed it to proceed in the foreclosure of said mortgage; that the mortgage is a first lien upon all of the property; that the property is not worth as much as the indebtedness due on the mortgage, and it asks that it be permitted to foreclose its mortgage upon

all of the property covered by it. The trustee answers this petition, denies the making, execution and delivery of the bonds, admits the execution and delivery of the mortgage upon the real and personal property and the recording of the mortgage, denies the bonds were certified by the Washington Trust Company, denies that the Bank of Montreal holds any bonds for value, admits that certain bonds were filed by the bankrupt, bearing eight per cent interest, with conditions of default as alleged; and alleges that no bonds were regularly issued by the bankrupt as required by the terms of the mortgage, and that all bonds issued are void; and that the mortgage so far as it embraces personal property that was permitted to be disposed of by the mortgagee for its own benefit is void. The answer prays that the mortgage be held of no effect, and that all of the bonds be cancelled.

This matter was before the Court heretofore upon an application to foreclose the mortgage in another forum. The then presiding Judge stated that, in as much as there is a dispute as to the property actually covered by the mortgage and as to the validity of the mortgage of the personal property, the status should be settled and determined in the bankrupt court as it could be done more speedily and at less [40] expense to the parties than in any other forum, and the matter was referred to the referee for the purpose of determining "all questions relating to the scope and validity of the mortgage, and when these questions are determined, the trustee must elect whether he will administer the equity of redemption for the



benefit of the general creditors, or surrender the mortgaged property for the foreclosure.” Pursuant to the suggestion in the memoranda decision the referee heard testimony, and has filed his decision, in which he holds that the validity of the mortgage has not been established, and that the authority to negotiate the bonds for the purpose given was not apparent, and that the bonds and mortgage are of no effect. The matter is now before this Court upon petition for a review.

It is first contended that the laws of the State of Washington do not authorize corporations to issue bonds and execute mortgages as disclosed by the records on file. Subdivision 3 of Sec. 3683, Rem. & Bal. Code, provides that corporations shall have power “to purchase, hold, mortgage, sell and convey real and personal property.” This provision of the statute it seems to me clearly disposes of the contention as to the power of the corporation to execute the mortgage.

It is further contended, on the argument, that there was no testimony before the Court which would show the authority for the execution of the mortgage by the officers. The certificate attached to the mortgage acknowledging its execution is as follows:

“State of Washington,  
County of Spokane,—ss.

On this 1st day of September A. D. 1908, before me personally appeared Alexander McPhaden to me known to be the President and A. G. Pike to me known to be the Secretary of the [41] WASHINGTON STEEL & BOLT COMPANY, the corpora-

tion that executed the within and foregoing instrument and on oath acknowledged the said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned, and on oath, each for himself and not one for the other, stated that he was authorized to execute said instrument and the seal affixed is the seal of the said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal in this certificate first above written.

[Notarial Seal] S. F. STREET,  
Notary Public in and for the State of Washington,  
Residing at Edmonds, Washington.

There also appears the following oath:

“State of Washington,  
County of Spokane,—ss.

ALEXANDER McPHADEN and A. G. PIKE, each being duly sworn on oath depose and say: That they are respectively the President and Secretary of the Washington Steel & Bolt Company, a corporation that executed the foregoing instrument; that they signed and executed the same on behalf of the Washington Steel & Bolt Company, by authority of the Board of Trustees thereof, and they make this affidavit in behalf of said Washington Steel & Bolt Company, because it is a corporation and they personally acknowledge the facts; that said instrument as a mortgage of personal property, was made in good



faith and without any design to hinder, delay, or defraud creditors.

A. McPHADEN.

A. G. PIKE.

Subscribed and sworn to before me this 1st day of September, A. D. 1908.

[Notarial Seal]

S. F. STREET,

Notary Public, in and for the State of Washington,  
Residing at Edmonds, Washington."

There is also the following acknowledgment on the part of the officers of the Washington Trust Company:

"State of Washington,  
County of Spokane,—ss.

On this 9th day of September, 1908, before me personally appeared J. Grier Long, Vice-President and R. L. Webster Secretary of the Washington Trust Company of Spokane, Washington, the corporation that executed, as Trustee, the within and foregoing instrument and acknowledged the said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned and on oath stated that they were authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation."

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate [42] first above written.

[Notarial Seal]

FRANK J. GUSE,

Notary Public, in and for the State of Washington,  
Residing at Spokane, Washington."

Attached to the mortgage, which was offered in evidence, is the following certificate by the county auditor of Snohomish County:

“State of Washington,  
County of Snohomish,—ss.

I, P. T. Lee, Auditor of Snohomish County, State of Washington and ex-officio Recorder of Deeds in and for said County, do hereby CERTIFY the above and foregoing to be a true and correct transcript of a mortgage or Deed of Trust from the WASHINGTON STEEL AND BOLT COMPANY to the WASHINGTON TRUST CO. now of record in this office in volume 69 of Mortgages page 338, and also duly filed and indexed as a Chattel Mortgage under file number 133386, Records of said Snohomish County, Wash.

Witness my hand and official seal this 11th day of March, A. D. 1913.

P. T. LEE,  
County Auditor and Ex-Officio Recorder of Deeds in  
and for said County.

By John Hangen,  
Deputy.”

Sec. 8796, Rem. & Bel. Code, provides:

“Copies of all deeds or other instruments of writing....which by law are to be filed or recorded in the office of the County Auditor....certified by the auditor under official seal, shall be admitted as *prima facie* evidence in all of the courts of this state.”

Sec. 1260, Rem. & Bal. Code, provides:

“Whenever any....mortgage....shall have



been recorded or filed in pursuance of law, copies of record....duly certified by the officer having the lawful custody thereof, with the seal of the office annexed....shall be received in evidence to all intents and purposes as the originals themselves.”

The supreme court of Washington holds that a certified copy of a mortgage which has been duly recorded is *prima facie* evidence of the facts recited in the certificate.

Gardner v. Port Blakely Mill Co., 8 Wash. 1;

Blewett v. Hash, 22 Wash. 536. [43]

The Trustee admitted the execution of the mortgage, which carries authenticity of the corporate seal. It seems to be well settled that a document signed by the secretary and president of a corporation, with corporate seal affixed, is *prima facie* evidence that it was legally executed. Thompson on Corporations, Vol. 4, Secs. 51, 55, says in substance that the seal of a corporation when established carries with it presumptive proof of everything else which is necessary to the validity of the instrument. It is, however, only *prima facie* evidence, and the effect of it is to shift the burden of proof upon the party alleging the non-execution and to require him to prove by clear and satisfactory evidence the want of authority to execute. The mortgage being executed by the president and secretary and having affixed thereto the corporate seal, such officers must be presumed to have acted within their corporate authority, and the burden of proving the contrary is on

the party alleging the want of authority or non-execution.

Schallard v. Eel River Na. Co., 11 Pac. 590;

Nevada Nickel Syndicate v. National Nickel Co.,  
96 Fed. 133,148.

As to the issuance of the notes or bonds, the testimony shows that \$20,000 of these bonds were delivered to McPhaden, the president, in payment of \$18,000 in money advanced by him from time to time to the corporation. The bonds were delivered more than four months prior to the insolvency. These bonds were delivered by McPhaden to the Bank of Montreal at Spokane; the consideration for all of the bonds was used by the bankrupt corporation. Thereafter further deliveries of bonds were made to the Bank of Montreal to the amount of \$24,500 and \$3,400. All of the bonds were delivered after being certified by the Washington Trust Company, as testified by [44] witness Ambrose, and were delivered as stated by Pike—in response to an inquiry:

“Well, at this latter time I judge the board of trustees added to the collateral with the Bank of Montreal, \$25,000 worth of additional security they already had. . . . It is a matter of record in the minute-book. . . . There was a motion made and carried. . . . Motion of board ordered the Washington Trust Company to turn them over to the bank.”

“Q. I will ask you if this money was borrowed by and used for the Washington Steel & Bolt Company or borrowed for and used by the Washington Steel & Bolt Company. A. Every cent of it. Q. Were you and Mr. McPhaden getting



this money, or was the Washington Steel & Bolt Company getting it? A. The Washington Steel & Bolt Company.”

This shows that affirmative action was taken by the board of trustees upon issuance of the bonds, and the minute-book being lost, such oral proof was properly admitted.

It is contended that the \$20,000 delivered to McPhaden for an indebtedness due to him was unlawful; and also the delivery of the bonds to the Bank of Montreal was without authority. The \$20,000 in bonds delivered to McPhaden having been more than four months prior to the insolvency of the bankrupt would not be avoided merely because it was for a prior existing indebtedness, nor would the delivery of the \$24,500 to the bank of Montreal to pay an overdraft for moneys which were being received from the bank and used by the Washington Steel & Bolt Company in the ordinary course of business. The money having been received by the corporation and used by it in the ordinary course of business with the knowledge of its officers and trustees, the corporation would be estopped from disclaiming delivery of the bonds, and such facts would operate as a ratification on the part of the corporation.

Kirwin v. Washington Match Co., 37 Wash. 285.

Porter v. Lassen County Land & Cattle Co., 59 Pac. 563;

Sells v. Rosedale Grocery & Commission Co., 17 So. 236;

Indianapolis Rolling Mill v. St. Louis etc. R., 120 U. S. 256. [45]

The testimony discloses that at a meeting of the board of trustees, at which there were present at least three members—Pike, McPhaden and Hall—the officers were authorized and directed to deliver these bonds to the Bank of Montreal. The minutes of that meeting perhaps were not actually prepared and signed at the meeting, but final action was taken, and the mere clerical work of extending the minutes into the record was left open. The witness was not certain that this was the meeting where that was done, but there was one meeting of the board at which this was done. Whether it was or not, it is immaterial; it is the conjunctive action of the board assembled for the purpose which operates to make a lawful meeting, and not the formal entry of the action that was taken. I am unable to determine from the testimony the amount of the bonds that were legally issued. From the testimony presented, I am satisfied that the \$20,000 of bonds delivered to McPhaden in payment of \$18,000 in money advanced are valid obligations against the estate. The fact that these bonds were issued for ninety cents on the dollar, when the bankrupt should have received ninety-five cents on the dollar, would not invalidate the bonds in the hands of the Bank of Montreal, an innocent holder. A liability may exist against some one for the 5% difference. I think, under the testimony, the \$27,500 additional bonds delivered to the Bank of Montreal are likewise valid liens. There is no testimony before the court as to the other bonds that are claimed to have been issued, or the circumstances under which such issuance was



made, or the authority by which they were negotiated.

It is contended that the mortgage is invalid as to the after-acquired property, both real and personal. The part of the mortgage intended to cover after-acquired property is as follows: [46]

“It is specially declared to be the intent and meaning hereof, that this mortgage shall embrace and cover all real and personal property, including all leasehold rights hereafter acquired, *an* all inventions, patents, patented, rights, licenses and franchises of every kind, and any and all other property of every nature, kind, and description now owned or hereafter acquired by the Washington Steel & Bolt Company, wheresoever situated, nevertheless, provided that the said Washington Steel & Bolt Company shall have the right to sell in the usual course of trade the stock and manufactured products of said Washington Steel & Bolt Company, freed from any lien under this mortgage or deed, but in case of foreclosure of this mortgage, any and all remaining unsold at that time shall be subject to the lien and condition of this mortgage.”

Under the law a mortgage may be so framed as to cover property to be afterwards acquired, and an equitable lien attaches immediately upon its acquisition.

27 Cyc. 1141-1142;

20 Am. & Eng. Enc. of Law, 916;

5 Am. & Eng. Enc. of Law, and cases cited;

12 Wall. 362 (United States v. N. O. Ry.);

Central Trust Co. v. Kneeland, 138 U. S. 414.

Fosdick v. Schall, 99 U. S. 285;

Farmers' Loan & Trust Co. v. Denver, etc., Co.,  
126 Fed. 46;

Knowles Loom Works v. Ryle, 97 Fed. 730;

Boston Safe-Deposit & Trust Co. v. Bankers &  
Merchants' Tel. Co., 36 Fed. 288.

I think the mortgage in so far as it seeks to cover stock and manufactured products of the Washington Steel & Bolt Company is invalid as to creditors and Trustee in Bankruptcy. The provisions of the mortgage would not be sufficient to hold the stock and manufactured products of the concern. The mortgage is valid as to the other properties.

The conclusion of the referee holding the mortgage herein invalid is therefore reversed.

In view of the condition of the record and the fact that all parties suggested by the record as holding bonds are not before the Court except through the trustee, and some holders of bonds are appearing by counsel, this matter will be remanded to the referee with instructions to ascertain [47] the amount and status of all bonds and report to the Court, to the end that all parties may receive equal protection.

JEREMIAH NETERER,

Judge.

[Indorsed]: Memo. Filed in the United States District Court, Western District of Washington, Sep. 22, 1913. Frank L. Crosby, Clerk. By B. O. Wright, Deputy. [48]



*In the District Court of the United States for  
the Western District of Washington, Northern  
Division.*

No. 4717.

In the Matter of the WASHINGTON STEEL &  
BOLT COMPANY, a Corporation,  
Bankrupt.

**Order [Reversing Order of Referee, etc.].**

BE IT REMEMBERED, That this cause came on duly and regularly for argument on the 8th day of September, 1913, upon the petition of the Washington Trust Company for a review of the order and decision of the Honorable John P. Hoyt, Referee, touching the validity of the mortgage executed and delivered by the Washington Steel & Bolt Company on September 9th, 1908, and the bonds secured by same; and the Court, having heard the argument, and becoming fully advised in the premises rendered and filed herein on September —, 1913, a memorandum decision, and thereafter a petition for rehearing was filed and the same was presented and argued to this court on September 13, 1913, and then denied,

NOW THEREFORE, IT IS HEREBY ORDERED, CONSIDERED AND ADJUDGED, That the order of the Referee herein sought to be reviewed be and the same hereby is reversed, and that the said mortgage be and the same hereby is adjudged and decreed a valid and existing lien according to its tenor upon all the property described

therein, and also upon all property acquired by said bankrupt subsequent to the execution of said mortgage, excepting, however, the stock of raw material obtained for manufacturing purposes and the manufactured product now possessed by the said bankrupt and its Trustees and as to said stock of raw material acquired for manufacturing purposes and the manufactured product the said mortgage is hereby adjudged [49] and decreed to be invalid; and,

This matter is remanded to the Referee to take proof and ascertain the status of each of the bonds issued under said mortgage and the amount due and owing upon each of said bonds and allow such items as justified by evidence and report his findings thereon to this court.

The Trustee in Bankruptcy excepts to each and every part hereof except that portion holding the mortgage invalid as to the raw material and the manufactured product and the petitioner, the Bank of Montreal, excepts to that portion hereof holding the mortgage invalid as to such raw materials and manufactured products.

Done in open court this 14th day of November, A. D. 1913.

JEREMIAH NETERER,

Judge.

Due service of the within Order and Decree acknowledged and a true copy received this 29 day of October, 1913.

[Endorsed]: Order and Decree. Filed in the United States District Court, Western District of



Washington. Nov. 14, 1913. Frank L. Crosby,  
Clerk. By B. O. Wright, Deputy. [50]

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*In the United States District Court for the Western  
District of Washington, Northern Division.*

No. 4717.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY, a Corporation,  
Bankrupt.

### **Report of Referee.**

This matter having been taken to the Court, on review, from a decision of the Referee holding the trust deed, or mortgage, herein invalid; and the Court having reversed the order of the Referee, and remanded the matter to the Referee "to take proof and ascertain the status of each of the bonds issued under said mortgage and the amount due and owing upon each of said bonds and allow such items as justified by the evidence and report his findings thereon to this Court; and the parties hereto having appeared before the undersigned, and submitted their proofs and allegations touching the validity of said bonds; and the Referee having made a report thereon; and the Court having referred the matter back to the Referee to make findings of fact and conclusions thereon, I make the following Findings of Fact and Conclusions of Law;

### **FINDINGS OF FACT.**

#### **I.**

That heretofore, and on or about the 1st day of September, 1908, the bankrupt herein, WASHING-

TON STEEL & BOLT COMPANY, a corporation, made its certain trust deed, or mortgage, to secure an issue of \$200,000 of bonds, \$75,000 of which bonds were to be immediately issued, and the balance thereof at some later date to be determined by the Trustees of said corporation. That, among other things, said mortgage, or trust deed, provided that none of said bonds should be sold or disposed of at less than ninety-five cents on the dollar of their face value, which provision was, by the terms of said instrument, made a condition running therewith, as follows: [51]

“ARTICLE XIX.

It is also mutually understood and agreed that as a further consideration running with this indenture that any bond or bonds issued under or secured by this indenture shall not be sold or disposed of directly or indirectly at a greater discount than five (5%) per cent thereof, that is to say, said bond or bonds shall not be sold or disposed of for less than ninety-five (95) cents on the dollar, of the par or face value of said bonds.”

II.

That said trust deed, or mortgage, was recorded in the office of the Auditor of Snohomish County, Washington, on the 15th day of September, 1908. That the office of said bankrupt corporation was located at Edmonds, Snohomish County, Washington, and the property covered by said trust deed, or mortgage, was situate in said county.

III.

That said trust deed, or mortgage, further provided



that the bonds to be issued thereunder were to be 750 in number, numbered from 1 to 750, inclusive. That 500 of said bonds were to be of the denomination of \$100 each; that 200 thereof was to be of the denomination of \$500 each; and that 50 thereof were to be of the denomination of \$1000 each.

#### IV.

That the bonds issued under said trust deed, or mortgage, and each of them, irrespective of whether they were intended as \$100 bonds; \$500 bonds; or \$1000 bonds, were in the following form, a number being inserted after the "No.," and an amount, "100," "500," or "1000," after the "\$5" at the top:

#### UNITED STATES OF AMERICA.

#### STATE OF WASHINGTON,

No.

WASHINGTON STEEL & BOLT COMPANY,  
Edmonds, Washington.

First Mortgage Eight Per Cent Gold Bond. [52]

KNOW ALL MEN BY THESE PRESENTS:  
That WASHINGTON STEEL & BOLT COMPANY, a corporation duly organized and existing under the laws of the State of Washington, for value received, acknowledges itself indebted to the bearer of this bond, or if this bond be registered to the registered holder thereof in the sum of One Thousand (\$1000) Dollars, (or Five Hundred (\$500) Dollars or One Hundred (\$100) Dollars as the case may be) which it hereby promises and agrees to pay in United States gold coin of the present standard of weight and fineness, on the first day of September, 1918, at the office of The Washington Trust Company,

Trustee, in the City of Spokane, County of Spokane, State of Washington, with interest thereon from the date of issue or sale thereof until paid, at the rate of eight (8%) per centum per annum payable semi-annually in like gold coin on the first day of March and September in each year on the presentation and surrender of the coupons annexed hereto, as they severally become due; all payments upon this bond both principal and interest shall be made without deduction for any tax or taxes that said Washington Steel & Bolt Company may be required to pay or to retain therefrom by any present or future laws of the United States of America, or of the State of Washington, said Washington Steel & Bolt Company hereby covenanting and agreeing to pay any and all such tax or taxes.

This bond is one of a series of Seven Hundred and Fifty (750) bonds, all of the same tenor and date, numbered consecutively from one (1) to and including the number Seven Hundred and Fifty (750). The first Five Hundred (500) bonds being of the denomination of One Hundred (\$100) Dollars each, and Two Hundred (200) bonds being of the denomination of Five Hundred (\$500) Dollars each and Fifty (50) bonds being of the denomination of One Thousand (\$1000) Dollars each, and all said bonds with the coupons thereto attached, are equally secured by a first mortgage or deed of trust, duly executed and delivered by the said Washington Steel & Bolt Company to THE WASHINGTON TRUST COMPANY in Spokane, County of Spokane, State of Washington, as Trustee, subject to all [53] the provisions and conditions therein, bearing even date



with this bond authorized by said WASHINGTON STEEL & BOLT COMPANY to be issued to an amount not exceeding in the aggregate the principal sum of Two Hundred Thousand (\$200,000) Dollars, nevertheless, with the understanding that Seventy-five Thousand (\$75,000) Dollars of said bonds shall be issued and placed on the market on the execution and delivery of this said Indenture, and the balance of One Hundred and Twenty-five Thousand (\$125,000) Dollars of said bonds to be held by the Trustee, and not issued and put on the market only in the event and at such time in the future as the Trustees of said Washington Steel & Bolt Company may deem to be for the best interests of said company, and covering and conveying all real property and personal property owned by said WASHINGTON STEEL & BOLT COMPANY, and particularly described in said mortgage and to which reference is hereby made for the nature and extent of the security and rights of the holders of these bonds, and the terms and conditions thereof, which is duly recorded in the office of the County Auditor of Snohomish County, State of Washington; in case default shall be made and shall continue for six (6) months in the payment of any interest on any of the bonds secured by this Indenture the principal of the said bonds with all the interest accrued and unpaid thereon, shall become due and payable at the election and upon declaration of the owners of one-third in amount of said bonds, then outstanding.

This bond may pass by delivery but may be registered as to the number thereof, upon the transfer

book of the TRUSTEE at its office, and after such registration duly certified thereon by the TRUSTEE this bond shall be transferred only on said books, unless transfer be to bearer, when it shall be again transferred by delivery subsequent to registration in like manner. This bond shall not become obligatory until it shall have been authenticated by the certificate of the Trustee endorsed hereon. [54]

No recourse shall be had for the payment of the principal or interest of this bond, against any individual incorporator, stockholder, officer or Trustee of said Washington Steel & Bolt Company, and any and all liabilities of incorporators, stockholders, trustees and officers of the said Washington Steel & Bolt Company individually being hereby released.

IN WITNESS WHEREOF, the said WASHINGTON STEEL & BOLT COMPANY has caused these presents to be signed and executed in its corporate name by its President, and countersigned by its Secretary, and its corporate seal hereto affixed, and the coupons for interest being authenticated by the engraved signature of its Treasurer to be attached hereon, this first day of September, 1908, all pursuant to legal authority in them vested to that end.

WASHINGTON STEEL & BOLT COMPANY,

By A. McPHADEN, President.

[L. S.]      Attest: A. G. PIKE, Secretary."

V.

That on or about the 1st day of September, 1908, by the direction of Washington Steel & Bolt Company, the bankrupt, there was issued to A. McPhaden by The Washington Trust Company, trustee under



said trust deed, or mortgage, what purported to be \$23,000, par value, of said bonds in payment of credits then shown by the books of said Washington Steel & Bolt Company to be owing to said McPhaden. That said McPhaden was then a stockholder and trustee of said corporation, and was then the president thereof. That said bonds were so issued to said McPhaden at ninety cents on the dollar of their purported par value.

## VI.

That on or about the 1st day of September, 1908, by the direction of Washington Steel & Bolt Company, the bankrupt, there was issued to A. G. Pike by The Washington Trust Company, trustee under said trust deed, or mortgage, what purported to be \$2,900, par value, of said bonds [55] in payment of credits then shown by the books of said Washington Steel & Bolt Company to be owing to said Pike. That said Pike was then a stockholder and trustee of said corporation, and was then the secretary thereof. That said bonds were so issued to said Pike at ninety cents on the dollar of their purported par value.

## VII.

That there were issued to the said A. McPhaden, from time to time thereafter, other of said bonds of the purported par value of \$11,200. That all such bonds were so issued by said trustee by the direction of the officers of said Washington Steel & Bolt Company, and in each instance were in payment of credits shown by the books of said corporation to be owing to said McPhaden, That all such bonds were so is-

sued to said McPhaden at ninety cents on the dollar of their purported par value, and that during all such times said McPhaden was a stockholder and trustee of said corporation, and was the president thereof.

### VIII.

That neither the said McPhaden or the said Pike paid any other or different consideration for said bonds, or any of them, than said credits, nor did either of them ever pay to said Washington Steel & Bolt Company any greater consideration for said bonds than said ninety cents on the dollar of the par value thereof.

### IX.

That from the 1st day of May, 1909, to the 28th day of July, 1909, both dates inclusive, the said A. McPhaden and the said A. G. Pike made and executed their four certain promissory notes, aggregating \$20,000 in amount, payable to the order of Washington Steel & Bolt Company, as follows:

May 1, 1909, one note for . . . .	\$10,000
May 11, 1909, one note for . . . . .	5,000
June 16, 1909, one note for. . . .	2,500
July 28, 1909, one note for. . . .	2,500

[56]

That said notes were endorsed by said Washington Steel & Bolt Company and were discounted by the Bank of Montreal, and the proceeds thereof placed to the credit of Washington Steel & Bolt Company. That as collateral to the said notes said McPhaden and Pike placed with said Bank of Montreal the bonds so issued to said Pike and \$20,000 of the bonds



so issued to said McPhaden.

X.

That no part of said notes has been paid, except that interest thereon has been paid to December 23, 1910.

XI.

That of the balance of said bonds so issued to said McPhaden, to wit \$14,200 par value, \$13,000 thereof were turned over by him to the following named persons in payment of debts owing them by him, to wit:

C. F. Chapin, Coeur d'Alene, Idaho.....	\$2,500
Meta McElroy, Spokane, Wash.....	2,000
J. H. Osborne, Chicago, Ill.....	5,900
Thomas S. Burley, Seattle, Wash.....	2,600

That the balance of said bonds (\$1,200) were not accounted for, and no testimony was given concerning them.

XII.

That said Chapin, McElroy and Burley were, at the time they acquired said bonds from said McPhaden, stockholders in said Washington Steel & Bolt Company, and each of them was a stockholder.

XIII.

That on, or about, the 20th day of March, 1911, a purported resolution of the board of trustees of Washington Steel & Bolt Company was prepared and sent to A. G. Pike, secretary and treasurer of said corporation, for adoption by said board. That said board of trustees at that time consisted of seven members. That no meeting of said board was called, nor did said board of trustees meet, nor did they adopt said resolution. That said Pike signed said

purported resolution; that two of the other trustees—Ammon and Hall—were telephoned to to come [57] to the office of the company to sign it. That Ammon went to the office and signed it without any other trustee being present. That afterwards Hall came there and signed it in presence of Ammon only of the trustees, and that it was taken to, and signed by two of the other trustees—Cosford and Ready—without any other member of the board of trustees being present. That said purported resolution provided that \$25,000 of “unsold bonds be placed with the Bank of Montreal as collateral on a \$20,000 loan that this company owes.” That upon the strength of said purported resolution, and not otherwise, there was issued and delivered to the Bank of Montreal \$25,000 of the bonds of Washington Steel & Bolt Company, the bankrupt, which said \$25,000 of bonds are a part of the bonds now held by said bank, and upon which the trustee, The Washington Trust Company, is seeking to foreclose said trust deed, or mortgage. That the only debt owed by said bankrupt to said bank at the time said \$25,000 of bonds was issued to it, as aforesaid, was that evidences by said \$20,000 notes, and there was no other or different consideration for the issuance of said \$25,000 of bonds, or any of them.

#### XIV.

That there was never a legal meeting of the board of trustees of said Washington Steel & Bolt Company. That said board was never called together as provided by the By-laws of said corporation, and was never legally called together. That there was never



any pretense of said board meeting after April 30, 1909. That none of the trustees of said corporation ever took the oath of office prescribed by law, or any oath as such trustees.

#### XV.

That said Washington Steel & Bolt Company was capitalized at \$2,000,000. That \$1,400,000 of said stock was given to said A. McPhaden in payment of a certain patent-right known as the "Clino Rail Joint Patent." That said patent-right was never used, by or attempted to be used by said corporation, the bankrupt, nor did it demonstrate, or [58] attempt to demonstrate its value, if value it had. That said patent-right was not worth to exceed \$4,500.

#### XVI.

That at all times said McPhaden owned a majority of the stock of said Washington Steel & Bolt Company, and absolutely controlled its officers and board of trustees. That the only business carried on by said corporation was the manufacture and sale of bolts, and that its business was very profitable for a time.

### CONCLUSIONS OF LAW.

#### I.

That the issuance of said bonds to said McPhaden and Pike was *ultra vires* and void, and the issuance of each of said bonds was *ultra vires* and void.

#### II.

That none of said bonds were enforceable against the bankrupt in the hands of said McPhaden or Pike.

#### III.

That the issuance of said \$25,000 of bonds to the

Bank of Montreal was *ultra vires* and void, and that said bonds are unenforcible against said bankrupt.

IV.

That each and every of the bonds issued by Washington Steel & Bolt Company, the bankrupt, was and is a non-negotiable instrument.

V.

That, by reason of the reference in each of said bonds to the trust deed, or mortgage, the transferees thereof took the same with knowledge of all the terms and conditions of said trust deed, or mortgage.

VI.

That none of the holders of said bonds are *bona fide* holders thereof, or holders thereof in due course.

VII.

That each and every of the outstanding bonds of said Washington Steel [59] & Bolt Company is a nullity.

All of which is respectfully submitted.

Dated July, 20, 1914.

JOHN P. HOYT,

Referee.

Receipt of a copy together with notice of presentation to referee at 2 o'clock P. M. July 13, 1914 and due service hereof admitted this 13th day of July, 1914.

JAMES B. MURPHY,

Attorney for Petitioner.

Sirs:

You will please take notice that the within Findings of Fact and Conclusions of Law will be presented



to the Referee for signing at 2 o'clock P. M. July 13, 1914.

Yours, etc.,  
J. W. Russell,  
Atty. for Trustee.

To Jas. B. Murphy, Esq.,  
Atty. for Petitioner.

[Indorsed]: Findings of Fact and Conclusions of Law. Filed July 20th, 1914, 2 P. M. John P. Hoyt, Referee.

Filed in U. S. District Court, for the Western District of Washington, Northern Division, July 21, 1914. [60]

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**[Order of Referee Disallowing Claim of Washington Trust Co. etc.]**

*In the District Court of the United States for the Western District of Washington, Northern Division.*

No. 4717.

In the Matter of WASHINGTON STEEL & BOLT COMPANY, a Corporation,

Bankrupt.

This matter having been taken to the Court, on review, from a decision of the Referee holding the trust deed, or mortgage, herein invalid; and the Court having reversed the order of the Referee, and remanded the matter to the Referee "to take proof and ascertain the status of each of the bonds issued under *under* the mortgage and the amount due and owing upon each

of said bonds and allow such items as justified by the evidence and report his findings thereon to this Court''; and the parties hereto having appeared before the undersigned, and submitted their proofs and allegations touching the validity of said bonds; and the Referee having made a report thereon; and the Court having referred the matter back to the Referee to make findings of fact and conclusions thereon; and such findings and conclusions having been made,

Now, on motion of J. W. Russell, attorney for the Trustee herein,

ORDERED, that the prayer of the petitioner herein, The Washington Trust Company, be, and the same hereby is denied, and it is further

ORDERED, that the claim of said petitioner, The Washington Trust Company, be, and the same hereby is rejected, disallowed and expunged from the list of claims upon the record in this case. Exception of Washington Trust Co. allowed.

Dated July 20, 1914.

JOHN P. HOYT,  
Referee. [61]

[Endorsed]: Order Disallowing Claim. Filed July 20th, 1914, 2 P. M. John P. Hoyt, Referee. Filed in the U. S. District Court, July 21, 1914. [62]



**[Exceptions of Washington Trust Co. to Report,  
Findings of Fact and Conclusions of Law of  
Referee.]**

*In the District Court of the United States for the  
Western District of Washington, Northern Divi-  
sion.*

No. 4717.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY, a Corporation,  
Bankrupt.

Comes now the Washington Trust Company, the petitioner in the above matter, at the time of the signing of the report of the referee, and makes the following objections and exceptions to said report and the Findings of Fact and Conclusions of Law made by said referee.

I.

Said Washington Trust Company hereby objects and excepts to the first finding of fact and to the whole and every part thereof and especially to that part thereof wherein the referee finds that the mortgage or trust deed therein referred to was executed on the first day of September, 1908, for the reason and upon the grounds that the said finding is not supported by the proofs and is contrary thereto, and is against the weight of the evidence and not within the scope of the authority of the referee.

II.

Said Washington Trust Company excepts to finding IV and to the whole and every part thereof ex-

cept the copy of the bond as therein set forth as illustrating the general tenor of the bonds therein referred to.

### III.

Said Washington Trust Company excepts to finding V made by the said referee and to the whole and every part thereof, and especially that part of said finding wherein the referee finds [63] that the bonds therein referred to were delivered to McPhaden in payment for credits shown by the books of the Washington Steel & Bolt Company for the reason and upon the grounds that the said finding is not supported by the proofs offered and is contrary thereto and contrary to the weight of the evidence.

### IV.

Said Washington Trust Company excepts to finding VI and the whole and every part thereof for the reason and upon the ground that the same is unsupported by any testimony or proof and is contrary to the great weight of the same.

### V.

Said Washington Trust Co. excepts to finding VII and to the whole and every part thereof and especially to that part thereof wherein the referee finds that the bonds referred to therein were given in payment of credits shown by the books of the corporation to be owing to McPhaden and to that part of the said finding wherein the referee finds that the said McPhaden was during all of said time a trustee and President of said corporation, for the reason and upon the ground that the same is unsupported by the testimony and contrary thereto.



## VI.

Said Washington Trust Company excepts to finding VIII and to the whole and every part thereof for the reason and upon the ground that the same is not supported by the testimony and is contrary to the testimony offered upon the trial.

## VII.

Said Washington Trust Company excepts to finding IX and to the whole and every part thereof, and especially to that part wherein the Referee finds that the notes therein referred to were discounted by the Bank of Montreal and the proceeds thereof placed to the credit of the Washington Steel & Bolt Company, and [64] especially excepts to that part of said finding wherein the Referee finds that as collateral to said notes, bonds issued to McPhaden & Pike were pledged to secure the payment thereof.

## VIII.

Said Washington Trust Company excepts to finding XI and to the whole and every part thereof for the reason and upon the grounds that the same is not supported by any testimony and is contrary to the great weight thereof.

Said Washington Trust Company excepts to finding XII and to the whole and every part thereof for the reason and upon the ground that the same is unsupported by any testimony and is contrary to the testimony offered upon the trial.

## IX.

Said Washington Trust Company excepts to finding XIII and to the whole and every part thereof for the reason and upon the ground that the same is un-

supported by any testimony and is contrary to the testimony offered upon the trial.

X.

Said Washington Trust Company excepts to finding XIV and to the whole and every part thereof for the reason and upon the ground that the same is unsupported by any testimony and is contrary to the testimony offered upon the trial.

XI.

Said Washington Trust Company excepts to finding XV and to the whole and every part thereof for the reason and upon the ground that the same is unsupported by any testimony and is contrary to the testimony offered upon the trial.

XII.

Said Washington Trust Company excepts to finding XVI and to the whole and every part thereof for the reason and upon the ground that the same is unsupported by any testimony and is contrary to the testimony offered upon the trial. [65]

XIV.

Said Washington Trust Company excepts to conclusion I made by said referee for the reason and upon the ground that it is unjustified by the findings of the Referee and because there was no testimony offered upon the trial justifying said conclusion.

XV.

Said Washington Trust Company excepts to conclusion II made by the Referee for the reason and upon the ground that it is unjustified by the findings of the Referee and because there was no testimony offered upon the trial justifying said conclusion.



## XVI.

The Washington Trust Company excepts to conclusion III for the reason and upon the ground that it is unjustified by the findings of the Referee and because there was no testimony offered upon the trial justifying said conclusion.

## XVII.

The Washington Trust Company excepts to conclusion IV for the reason and upon the ground that it is unjustified by the findings of the Referee and because there was no testimony offered upon the trial justifying said conclusion.

## XVIII.

The Washington Trust Company excepts to conclusion V for the reason and upon the ground that it is unjustified by the findings of the Referee and because there was no testimony offered upon the trial justifying said conclusion.

## XIX.

The Washington Trust Company excepts to conclusion VI for the reason and upon the ground that it is unjustified by the findings of the Referee and because there was no testimony offered upon the trial justifying said conclusion. [66]

## XX.

The Washington Trust Company excepts to conclusion VII for the reason and upon the ground that it is unjustified by the findings of the Referee and because there was no testimony offered upon the trial justifying said conclusion.

JAMES B. MURPHY,

Attorney for Washington Trust Company.

The foregoing objections and exceptions, at the time of the signing of the Referee's report this day signed herein, were duly and regularly made and presented and the said objections and exceptions are hereby allowed.

Dated this 20th day of July, 1914.

JOHN P. HOYT,  
Referee.

[Endorsed]: Exceptions. Filed July 20, 1914, 2 P. M. John P. Hoyt, Referee. Filed U. S. District Court, Jul. 21, 1914. Frank L. Crosby, Clerk. [67]

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*In the District Court of the United States in  
and for the Western District of Washington,  
Northern Division.*

No. 4717.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY, a Corporation,

Bankrupt.

**Exceptions to Order Disallowing Claim [of  
Washington Trust Co.].**

Comes now the Washington Trust Company, and having heretofore reserved its exceptions to the order entered herein on the 20th day of July, 1914, hereby formally excepts to the whole and every part of said order, and especially to that part of said order wherein the motion of J. W. Russell, Attorney, is granted, and the prayer of the petition of the Washington Trust Company is denied and wherein the said Referee orders that the claim of the Wash-



ington Trust Company be rejected and disallowed and expunged from the list of claims upon record in that case.

JAMES B. MURPHY,

Attorney for Washington Trust Company.

The foregoing exceptions were duly and regularly presented, and are hereby allowed.

Dated this 20th day of July, 1914.

JOHN P. HOYT,

Referee.

[Indorsed]: Exceptions to Order Disallowing Claim. Filed in the United States District Court, Western District of Washington. July 21, 1914. Frank L. Crosby, Clerk. By S. E. Leitch, Deputy. [68]

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**[Petition of Washington Trust Co. for Review of Findings of Fact and Conclusions of Law and Judgment of July 20, 1914.]**

*In the District Court of the United States for the Western District of Washington, Northern Division.*

No. 4717.

In the Matter of WASHINGTON STEEL & BOLT COMPANY, a Corporation,

Bankrupt.

PETITION FOR REVIEW.

To the Honorable Referee in Bankruptcy:

Your petitioner, the Washington Trust Company, feeling itself aggrieved by the Findings of Fact and Conclusions of Law and Judgment ren-

dered in the above-entitled cause by you, on the 20th day of July, 1914, touching the validity of the bonds involved in the above-entitled matter, hereby petitions for a review of all matters touching or in any way concerning or relating to the validity of said bonds and the amount due thereon by the above-entitled court and the judge thereof, and as grounds for review your petitioner respectfully represents as follows:

### I.

That heretofore, to wit, on the 6th day of July, 1914, the above-entitled court referred this matter back to the Referee to make Findings of Fact, Conclusions of Law and to enter an order or judgment thereon touching the validity of the bonds and the amount due thereon and concerning the circumstances said bonds were negotiated under an order previously, to wit, on the 14th day of November, 1913, entered herein, and that the said Referee, on the 20th day of July, 1914, filed his Findings, Conclusions of Law and Judgment herein, declaring the said bonds void and disregarded the principles of law announced as the law of the case by the above-entitled court, and neglected to make findings of fact concerning the amounts due upon said bonds and the circumstances under which they were sold. [69]

### II.

That your petitioner feels itself aggrieved by the said Findings of Fact, Conclusions of Law and order or judgment, and desires the correctness thereof, and of the whole and every part thereof to be reviewed by the Judge of the District Court for the Western



District of Washington, Northern Division, and your petitioner contends that the said findings, conclusions and order or judgment of the Referee are erroneous, and that the said Referee committed error in the following particulars:

1. That said Referee erred in disregarding the law as announced by the Court for his guidance in determining the validity of the said bonds, and in taking evidence pertaining thereto.

2. That the said Referee erred in failing and neglecting and refusing to make findings of fact touching the amount due upon said bonds.

3. That the Referee erred in failing, neglecting and refusing to make any findings of fact concerning the status of each bond issued under said mortgage and the amount due thereon.

4. That the said Referee erred in making Finding I, and especially in finding that the mortgage therein referred to was made on or about the first day of September, 1908.

5. That said Referee erred in failing and neglecting and refusing to find that the said mortgage was executed on or about the 9th day of September, 1908, instead of the first day of September, 1908.

6. That the said Referee erred in making Finding IV and in making the whole and every part thereof except as to the general tenor of the bonds, the form of which is set forth therein.

7. That the said Referee erred in making his Finding V and in making the whole and every part thereof, and erred in finding in said fifth paragraph of said findings that the bonds therein referred to

were delivered to McPhaden in payment for credits shown [70] by the books of the Washington Steel & Bolt Company.

8. That the said Referee erred in failing and refusing to find that the said McPhaden paid cash into the treasury of the said Bank for all the bonds that were issued to him, and in failing and neglecting to find that the Washington Steel & Bolt Company received and used the money paid in by McPhaden and in failing and refusing to find that McPhaden paid the money into the said treasury for the purpose of purchasing bonds therewith, and that the said Washington Trust Company received the said money knowing that it was paid in by said McPhaden on account of bonds to be delivered to him, and that the said Referee further erred in finding that the bonds were issued to McPhaden for ninety cents (90¢) on the dollar and in failing and refusing to find that the bonds were sold to McPhaden for ninety-five cents (95¢) on the dollar and that McPhaden was allowed five percent (5%) commission.

9. That the said Referee erred in making the sixth finding of fact and the whole and every part thereof, and in finding that the stock issued to A. G. Pike was issued to him in payment of credits then appearing in his favor on the books of the Washington Steel and Bolt Company, and further erred in finding that the said bonds were issued to the said Pike at ninety cents (90¢) on the dollar of their par value instead of ninety-five per cent (95%) of their par value, five per cent (5%) being allowed as a commission.



10. That the said Referee erred in making the seventh finding of fact and in making the whole and every part thereof. The said Referee further erred in finding that the bonds in said paragraph VII referred to were in each instance issued in the payment of credits shown by the books of the said corporation to be owing to the said McPhaden, and in finding that the said bonds were issued to McPhaden at (90¢) ninety cents on the dollar and that the said McPhaden was at all of the time the President and Trustee of the said company, and erred in failing to find that the said bonds were in reality directly [71] sold to the present holders thereof through McPhaden, and in failing and refusing to find that the said bonds were issued to McPhaden for cash payments made by him for the express purpose of purchasing bonds therewith and in failing to find that the said bonds were issued to McPhaden for ninety-five cents (95¢) on the dollar instead of ninety cents (90¢) Five cents (5¢) being allowed him for a commission for selling said bonds, and in further failing and refusing to find that the said McPhaden was not, during all of said time, the President and Trustee of the said Washington Trust Company.

11. That the said Referee further erred in making the eighth finding of fact and in making the whole and every part thereof, and in failing and refusing to find that the said McPhaden and Pike referred to therein did pay cash for all the bonds issued to them or either of them, and that they were sold to the said McPhaden and Pike at ninety-five cents (95¢) of their par value, and that McPhaden and

Pike were allowed the usual commission of five cents (5¢) in addition thereto.

12. That the said Referee erred in making the ninth finding of fact and the whole and every part thereof, and in finding that McPhaden and Pike executed their promissory notes to the Washington Steel & Bolt Company and that the Washington Steel & Bolt Company discounted said notes at the Bank of Montreal, and the said Referee further erred in failing and refusing to find from the testimony in that connection that the said Washington Steel & Bolt Company, prior to the execution of the notes therein, referred to, had arranged for a line of credit with the Bank of Montreal to the extent of Twenty Thousand Dollars (\$20,000.00), and provided for a loan in that sum and that the Bank of Montreal required, in addition to the credit and standing of the said Washington Steel & Bolt Company, that McPhaden and Pike should execute and deliver their promissory note to the Washington Steel & Bolt Company and the Washington Steel & Bolt Company should in turn endorse it to the Bank [72] of Montreal and that the bonds therein referred to should be deposited with the Bank of Montreal, each and all, as security for the sole and only purpose of money loaned to the said Washington Steel & Bolt Company and further erred in failing and refusing to find that the notes and the bonds referred to in said paragraph were delivered to the Bank of Montreal as collateral security for advances and loans made to the Washington Steel & Bolt Company, and not otherwise, and in failing to find the



correct amount of bonds deposited with the Bank of Montreal by the said Pike & and the said McPhaden as such security.

13. That the said Referee further erred in making Finding XI and in making the whole and every part thereof, and in finding that the bonds issued to McPhaden were turned over by him to the persons therein named, and in failing and refusing to find in that particular that the said Chapin, McElroy and Burley purchased their bonds from the Washington Steel & Bolt Company through McPhaden, and that they paid therefor One Hundred cents (100¢) on the dollar.

14. That the said Referee erred in making his Finding XII and in making the whole and every part thereof, in finding that the said Chapin, McElroy and Burley were, at the time they acquired the bonds therein referred to, stockholders of the Washington Steel & Bolt Company.

15. That the said Referee erred in making Finding XIII and in making the whole and every part thereof, and in failing and refusing to find that the said Board of Trustees met, considered and passed the resolutions therein referred to, and in failing and refusing to find that the bonds in said paragraph referred to were not duly and regularly issued and lawfully and with authority delivered by the Washington Trust Company to the said Bank of Montreal pursuant to resolutions of the Board of Trustees of the Washington Steel & Bolt Company duly and regularly made.

16. That the said Referee erred in making his fourteenth finding of fact and in making the whole

and every part thereof and in finding that there was never a legal meeting of the Board of [73] Trustees of the Washington Steel & Bolt Company and in finding that the Board was never called together, as provided by the by-laws of the said corporation and was never legally called together and in further finding that there was never any pretense of said Board meeting after April 30, 1909, and in further finding that none of the trustees of said corporation ever took the oath of office as prescribed by law or the oath as trustees, and failing and refusing to find that the trustees of said corporation met as such, considered their action and knowingly and intelligently voted upon all the issues and matters pertaining to said bonds referred to in said paragraph.

17. That the said Referee further erred in making the fifteenth Finding of Fact, and the whole and every part thereof, the same being unnecessary and irrelevant to the issue and unsupported by the testimony.

18. The said Referee erred in making Finding XVI, and in making the whole and every part thereof, and in finding that the said McPhaden absolutely controlled its officers and the Board of Trustees, and in failing and refusing to find that the said Board of Trustees acted intelligently and according to its best judgment.

19. That the said Referee erred in making the first conclusion of law and in failing and neglecting to conclude that the bonds therein referred to were legal and lawfully made and issued and that each of the said bonds is valid.

20. That the said Referee erred in concluding that



none of the bonds were enforceable against the Bankrupt in the hands of McPhaden and Pike and in failing and neglecting to conclude that the said bonds and each of them were enforceable against the said Bankrupt in the hands of McPhaden.

21. That the said Referee erred in making his third conclusion of law and in concluding that the issuance of said Twenty-five Thousand Dollars (\$25,000.00) of bonds to the Bank of Montreal was null and void [74] and that the said bonds were unenforceable against said Bankrupt and in failing and refusing to conclude that the said bonds therein referred to were valid and binding upon the said Bankrupt and enforceable.

22. That the said Referee erred in deducing his fourth conclusion and in concluding therein that each and every of the bonds issued by the Washington Steel & Bolt Company was and is a nonnegotiable instrument, and in failing and refusing to conclude that each and every of said bonds was negotiable.

23. That the said Referee erred in making his fifth conclusion of law and in concluding therein that by reason of the reference in each of said bonds to the trust deed or mortgage, the transferees thereof took the same with knowledge of all the terms or conditions of the trust deed or mortgage.

24. That the said Referee erred in making his sixth conclusion of law and in concluding therein that none of the holders of said bonds were *bona fide* holders thereof nor holders thereof in due course, and in failing and refusing to conclude and find that each of the holders of said bonds was *bona fide*

holders thereof for value in *in* due course and without notice of any irregularity or defect.

25. That the said Referee erred in making his seventh conclusion of law and in concluding that each and every of the outstanding bonds of the Washington Steel & Bolt Company is a nullity, and in failing and refusing to find that each and every of the outstanding bonds of the Washington Steel & Bolt Company is a valid and binding obligation upon the said bankrupt and secured by the trust deed in said findings referred to, and that the same is enforceable against the said Bankrupt and that the said security described in the said trust deed is acknowledged holden therefor.

26. That the said Referee failed and neglected to find that the Bank of Montreal loaned to the Washington Steel & Bolt Company in the ordinary course of business, the sum of Twenty-five Thousand [75] Seven Hundred Fifty Dollars (\$25,750.00), and there still remains due and unpaid to said Bank the sum of Twenty Thousand Nine Hundred Ninety-four & 61/100 (\$20,994.61) Dollars principal, and interest of approximately Three Thousand Six Hundred Eleven & 96/100 Dollars (\$3611.96).

27. That the said Referee erred in failing to conclude that there was deposited as security for the payment of said money so loaned to the Washington Steel & Bolt Company Forty-seven Thousand Nine Hundred Dollars (\$47,900.00) as par value of the bonds in said findings referred to, which bonds are numbered as follows:

Nos. 702, 704, 705, 708, to 716, both inclusive; 718 to



732, both inclusive, being 27 bonds of \$1,000 each;

Nos. 661, 663, 667 and 671, both inclusive; 647 to 690, both inclusive, 695 and 699, being 26 bonds of \$500. each;

Nos. 291 to 300, both inclusive, being 10 bonds of \$100 each;

Nos. 665, 662, 672 and 673, being four bonds of \$500 each;

Nos. 703 and 707, being two bonds of \$1,000 each;

Nos. 399 to 407, both inclusive, being 9 bonds of \$100. each;

Nos. 691 to 694, both inclusive, being 4 bonds of \$500. each.

28. That the said Referee erred in failing and refusing to find that interest is in arrears upon each of said bonds from September 1, 1908.

29. That the said Referee erred in failing and refusing to find that C. F. Chapin of Coeur d'Alene, Idaho, was the owner of three bonds numbered 696 to 698 inclusive purchased in 1908 and two bonds purchased April 2, 1909, all five bonds of the par value of \$500.00 each, a total par value of Twenty-five Hundred Dollars (\$2500.00).

30. That the said Referee erred in failing and refusing to find that Mrs. Meta McElroy was the true and lawful owner of bonds numbered 700 and 706, one of the value of One Thousand Dollars (\$1000.) and one of the value of Five Hundred Dollars (\$500.00) purchased on September 26, 1908, and bonds numbered 439, 440, 441, 442, 446, of the par value of One Hundred Dollars each, purchased on June 16, [76] 1909, six semi-annual payments of

interest having been paid on each bond, total par value of which was Two Thousand Dollars (\$2000.00).

31. That the said Referee erred in failing and refusing to find that J. H. Osborne of Chicago, Illinois, was the true and lawful owner of bonds purchased in the fall of 1909, eight bonds being of the par value of Five Hundred Dollars (\$500.00) each and thirty bonds being of the par value of One Hundred Dollars (\$100.00) each, making a total par value of Seven Thousand Dollars, and that interest is in arrears thereon from the first day of September, 1911.

32. That the said Referee erred in failing and refusing to find that Thos. S. Burley is the owner of bonds numbered 443, 444, 445, 498, 499, 500, 701 and 717, purchased September 14, 1908, two of the par value of One Thousand Dollars (\$1000.00) and six bonds of the par value of One Hundred (\$100.00), a total par value of Two Thousand Six Hundred Dollars, and that interest is in arrears thereon from the first day of September, 1912.

33. That the Referee erred in granting Motion to J. W. Russell, attorney for the Trustee, for an order denying the prayer of the petition of the Washington Trust Company.

34. That the said Referee erred in ordering that the prayer of said petition, the Washington Trust Company, be denied and in refusing to enter an order granting the prayer of the said petition.

35. That the said Referee erred in entering an order rejecting and disallowing and expunging from the list of claims upon the record in this case the



claim of the Washington Trust Company.

36. That said Referee erred in refusing to allow said claim according to the prayer and contention of the said Washington Trust Company. [77]

37. That the said Referee erred in adjudging bonds herein referred to binding obligations upon the said Bankrupt and in fixing the amount thereof, and in entering a decree directing the foreclosure thereof.

38. That the said Referee erred in failing and refusing to adjudge that the bonds held by the Bank of Montreal of the par value of Forty-seven Thousand Nine Hundred Dollars (\$47,900.00), which bonds are described as follows:

“Nos. 702, 704, 705, 708 to 716, both inclusive; 718 to 732, both inclusive, being 27 bonds of \$1,000 each;

Nos. 661, 663, 667 to 671, both inclusive; 674 to 690, both inclusive; 695 and 699, being 26 bonds of \$500 each;

Nos. 291 to 300, both inclusive, being 10 bonds of \$100 each;

Nos. 665, 662, 672, and 673, being four bonds of \$500 each;

Nos. 703 and 708, being two bonds of \$1,000 each;

Nos. 399 to 407, both inclusive, being 9 bonds of \$100 each;

Nos. 691 to 694, both inclusive, being four bonds of \$500 each”;

were held by them in good faith for valuable consideration, acquired in the due course of business, and that there was due thereon the sum of Forty-seven

Thousand Nine Hundred Dollars (\$47,900.00), with interest from the first day of September, 1908.

39. That the said Referee erred in failing and refusing to adjudge that the bonds held by C. F. Chapin of Coeur d'Alene, Idaho, and described as follows: Nos. 696 to 698, inclusive, purchased in 1908, and two bonds purchased April 2, 1909, of the par value of Five Hundred Dollars (\$500.00) each, a total par value of Twenty-five Hundred Dollars (\$2500.00) being five bonds in all, were acquired by the said C. F. Chapin in due course for valuable consideration and without notice of any equities existing against them.

40. That the said Referee erred in failing and refusing to adjudge that the bonds held by Mrs. Meta McElroy and described as follows: Nos. 700 to 706, one of the value of One Thousand Dollars [78] (\$1,000.00) and one of the value of Five Hundred Dollars (\$500.00) purchased on September 26, 1908, and bonds numbered 439, 440, 441, 442, 446 of the par value of One Hundred Dollars each purchased on June 16, 1909, six semi-annual payments of interest having been paid on each bond, total par value of which was Two Thousand Dollars (\$2,000.00), being seven bonds in all, were acquired by the said Mrs. Meta McElroy in due course for valuable consideration and without notice of any equities existing against them.

41. That the said Referee erred in failing and refusing to adjudge that the bonds held by J. H. Osborne of Chicago, Ill., and described as follows: Eight bonds of the par value of Five Hundred Dollars (\$500.00) each and thirty bonds of the par value of



One Hundred Dollars (\$100.00) each, purchased in the fall of 1909, of the total par value of Seven Thousand Dollars, with interest in arrears thereon from the first day of September, 1911, were acquired by the said J. H. Osborne in due course, for valuable consideration and without notice of any equities existing against them.

42. That the said Referee erred in failing and refusing to adjudge that the bonds held by Thos. S. Burley and described as follows: Nos. 443, 444, 445, 498, 499, 500, 701 and 717, purchased September 14, 1908, two of the par value of One Thousand Dollars (\$1,000.00) and six bonds of the par value of One Hundred Dollars (\$100.00), a total par value of Two Thousand Six Hundred Dollars (\$2,600.00) with interest in arrears thereon from the first day of September, 1912, were acquired by the said Thos. S. Burley in due course, for valuable consideration and without notice of any equities existing against them.

43. That the said referee erred in failing and refusing to enter a judgment directing the foreclosure of the said mortgage and the sale of all the real property described therein, and all the personal property save and except that executed from the lien by the previous judgment of this Court, and directing the application of proceeds to the payment of the claim of the Washington Trust Company, as represented by said bonds, to the exclusion of all other sums.

44. That the said Referee erred in neglecting and failing to prepare Findings of Fact and Conclusions of Law himself, and in referring the matter of pre-

paring Findings of Fact and Conclusions of Law and decree or judgment to the attorneys for the Bankrupt herein. [79]

WHEREFORE: Your petitioner respectfully prays that this Court review the Findings of Fact, Conclusions of Law and Order and Decree of the Referee, and that this Court proceed to make Findings of Fact, Conclusions of Law, and to enter a decree in accordance with the opinion of the Court heretofore rendered herein, and in accordance with the evidence heretofore taken in this cause and considered by the Referee, and that your petitioner have such other and further relief as this Court may deem consistent with the record as the same is certified to this Court by the said Referee and as the record shall appear, and your petitioner further prays that the said Referee certify to this Court for review all the testimony and matters herein pertaining to said cause, which shall in any way affect the same.

JAMES B. MURPHY,

Attorney for Washington Trust Company. [80]

State of Washington,

County of King.

I, James B. Murphy, Attorney for petitioner, mentioned and described in the foregoing petition, do make solemn oath, and state that the foregoing petition is true according to my best knowledge, information and belief, and further certify that said petition, in my opinion, is well founded in point of law, and that it is not interposed for delay.

JAMES B. MURPHY.



Subscribed and sworn to before me this 27th day of July, 1914.

[Seal]

JNO. R. WILSON,  
Notary Public in and for the State of Washington,  
Residing at Seattle, County and State Aforesaid.

Due service of the within Petition for Review acknowledged, and a true copy received this 27th day of July, 1914.

J. W. RUSSELL,  
Attorney for Trustee.

[Endorsed]: Petition for Review. Filed July 27th, 1914, 2 P. M. John P. Hoyt, Referee. Filed in the U. S. District Court. Jul. 31, 1914. [81]

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*In the District Court of the United States in and for  
the Western District of Washington, Northern  
Division.*

No. 4717.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY, a Corporation,  
Bankrupt.

**Stipulation [Re Testimony].**

THIS WITNESSETH That it was orally stipulated upon the taking of the testimony in the above matter that all testimony previously taken herein should be considered by the Referee in making his Findings and Conclusions and Order, and that all the testimony heretofore taken upon previous hearings should be considered, together with the testimony taken upon the last hearing.

Dated this 29th day of July, 1914.

J. M. RUSSELL,  
Attorney for the Trustee in Bankruptcy.

JAMES B. MURPHY,  
Attorney for the Washington Trust Co.

[Indorsed]: Stipulation. Filed July 30th, 1913,  
at 10 A. M. John P. Hoyt, Referee. Filed U. S.  
District Court Jul. 31, 1914. Frank L. Crosby,  
Clerk. [82]

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*In the District Court of the United States for the  
Western District of Washington, Northern Di-  
vision.*

IN BANKRUPTCY—No. —.

In the Matter of WASHINGTON STEEL & BOLT  
CO., a Corporation,

Bankrupt.

**Petition [of Trustee in Bankruptcy for Order  
Directing Sale of Certain Property, etc.]**

The petition of Edward H. Chavelle respectfully  
shows and alleges:

I.

That your petitioner was heretofore appointed  
trustee in bankruptcy of all the property of the above  
bankrupt, and has duly qualified as such by filing  
his bond in this court for the faithful performance  
of his duties, and is now acting as such trustee.

II.

That your petitioner has taken possession of all  
the property of said bankrupt, which includes the  
following described real estate and personal estate



located at Edmonds, in the County of Snohomish and State of Washington:

All that certain tract or parcel of land, with the buildings thereon erected, and all machinery connected with or attached to said building and property situated in the Town of Edmonds, County of Snohomish and State of Washington, bounded as follows;

Beginning at the point of intersection of section line between sections Twenty-three (23) and Twenty-six (26), Township Twenty-seven (27) North, Range Three (3) East of W. M., with the center line of the Great Northern Railroad right of way; thence angle west to south 48 degrees, 46 minutes (magnetic course south 40 degrees, 56 minutes west), along the center line of the Great Northern right of way, 339/5 feet; thence angle right 46 degrees, 17 minutes a [83] distance of 69.18 feet to the true place of beginning. Thence same course 395.8; thence angle left 64 degrees, 25 minutes, 290.58 feet; thence angle left 115 degrees, 35 minutes 269.72 feet; thence angle left 46 degrees, 17 minutes 362.5 feet to the place of beginning, containing 2.004 acres, also all the abutting tide lands in front of the above described premises amounting to about six (6) acres or about (8) acres in all, and any other real estate that may be hereafter acquired by said Washington Steel & Bolt Company, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, all buildings, permanent fixtures or mechanical constructions, and all machinery now incorporated into the real estate, or any other building, fixtures or machinery hereafter se-

cured by said Washington Steel and Bolt Company, and placed upon said described real estate, or any real estate hereafter acquired by said Washington Steel & Bolt Company, and all riparian or other rights connected therewith. And upon the same considerations, said Washington Steel & Bolt Company hereby sells, transfers and assigns to said Trustee, and its successors in trust, the personal property of said Washington Steel & Bolt Company, all being situate in or used with said company's plant and bolt factory or shops and any other buildings now situate, and being upon the above described land, or hereafter at any time during the life of this mortgage, that may be placed upon said above-described land or premises, and particularly known as the Washington Steel & Bolt Company's factory and plant, to wit:

One Ajax hot pressed nut machine 16 ton.

One Acme nut tapper 2.

One Acme nut tapper 1.

One Alligator Shear.

One Acme heading and forging machine 1. [84]

One Acme heading and forging machine 2.

One Acme threading machine 2.

One Acme threading machine 1.

One Acme pointing machine.

One 70 h. p. boiler Erie City manufacture.

One 60 h. p. Engine.

\$6,000 worth of dies, in die houses on above described real estate.

One burring machine, water works, hose, electric lights, plant. A complete oil pumping station with heaters, double strainer, together with pipings



and Rockwell oil burners for boiler, and also one three-ton tumbler. Blacksmithing outfit such as vices, anvils, emery stands, tongs, hammers, drills, punches, etc. All leather endless belting and any other belting owned and used by said Washington Steel & Bolt Company in and about its said bolt factory. All pulleys owned by said Washington Steel & Bolt Company used in and about said bolt plant, all of the same being of steel material. All roller bearings for shaftings 120 feet or more long. All office furniture and fixtures among other things including desk, filing cabinet, typewriter, steam-heating apparatus, situate and being in the office of said company, which said office building is now located upon the above-described real estate; together with all and singular the tenements, hereditaments and appurtenances belonging to said property; and the reversion, remainders, tolls, income, rents, issue and profits thereof including all chattels, fixtures, furnishings, machinery, tools, and every other estate, right, title and interest property and other appurtenances of said Washington Steel & Bolt Company, a corporation, bankrupt.

### III.

That heretofore, on the — day of — 191—, an involuntary petition in bankruptcy was filed herein against the above-named bankrupt, and therefore, and prior to the date of the filing of said [85] petitioner, to wit, on the 1st day of September, 1908, said bankrupt, for and in consideration of the alleged sum of two hundred thousand dollars (\$200,000.00), made and executed and delivered a cer-

tain pretended trust deed or mortgage alleged to cover all the above-described property, to the Washington Trust Company, a corporation organized and existing under and by virtue of the laws of the State of Washington, which said pretended trust deed or mortgage was made for the purpose of securing an issue of two hundred thousand dollars (\$200,000.00) of the bonds of said Washington Steel & Bolt Company.

#### IV.

That, as your petitioner is informed and verily believes, no bonds were ever regularly issued under said pretended trust deed or mortgage. That certain bonds, amounting in the aggregate to the sum of sixty-four thousand seven hundred dollars (\$64,700.00) are now outstanding and claimed by the holders thereof to be valid. That, as your petitioner is informed and verily believes, a great majority of said outstanding bonds, if not all of them, were issued without consideration, and that the same are absolutely void. That your petitioner's belief as to the invalidity of said outstanding bonds is, in a measure, based upon the testimony of certain of the officers of said bankrupt corporation taken herein before the Referee, which said testimony is hereby referred to and made a part of this petition. That the question of the validity of said outstanding bonds, and each of them, will be litigated by your petitioner, and that such litigation will take a long time. That the care of said property is a burden to your petitioner.



## V.

That heretofore and by order of this Court, all of said property heretofore described was duly appraised at the sum of ——— Dollars [86] (\$——) for the personalty, and ——— Dollars (\$——) for the real estate, and your petitioner is informed and does verily believe, that said property, if sold by your petitioner subject to the lien of the mortgage above mentioned will not realize any equity whatsoever by reason of the fact that said property is not worth the amount of said outstanding bonds, and no one interested in property of this character would purchase said property subject to it.

## VI.

That your petitioner has examined and caused to be examined several witnesses, to all of which testimony your petitioner upon the hearing of the application herein begs leave to refer and from which said examination the facts as hereinbefore alleged do more particularly and at length appear.

## VII.

That your petitioner, in the performance of his duties as said trustee, is desirous of immediately disposing of all the property of the bankrupt herein, and in order to do so most advantageously to the interest of the creditors of the said bankrupt, does verily believe that said property should be sold free of and from the lien of said mortgage, which said mortgage in detail covers all of said property as hereinbefore described, and which was made, executed and delivered on said 1st day of September, 1908, by said Washington Steel & Bolt Company, a cor-

poration, bankrupt herein, for the sum of two hundred thousand dollars (\$200,000.00) and which was thereafter and on the 16th day of September, 1908, at 11:15 o'clock A. M., duly recorded in volume 69 of mortgages, at page 338, in the office of the auditor of Snohomish County, State of Washington.

### VIII.

That, in so far as your petitioner has been able to ascertain, the outstanding bonds of the said Washington Steel & Bolt Company [87] are held by the following named persons, firms and corporations, viz.:

Washington Trust Company, Spokane, Washington.

Bank of Montreal, Spokane, Washington.

C. F. Chapin, Coeur d'Alene, Idaho.

R. J. Danson, Spokane, Washington.

J. H. Osborne, Chicago, Ill.

A. McPhaden, c/o A. C. Gunn, Burke Bldg.,  
Seattle, Wash.

A. G. Pike, Seattle, Washington.

WHEREFORE, your petitioner respectfully prays for an order herein directing your petitioner as Trustee of the Washington Steel & Bolt Co., to sell according to law, the property mentioned and described in said mortgage and in this petition fully set forth, at public auction in the manner prescribed by the Acts of Congress relating to Bankruptcy and the general orders of the Supreme Court, free of and from the lien of said mortgage, together with such other free or different relief as is meet and equitable in the premises;



And your petitioner will ever pray, etc.

Dated at Seattle, in said District, this 9th day of December, 1913.

EDWARD H. CHAVELLE,  
Petitioner.

J. W. RUSSELL,  
Attorney for Petitioner.

Postoffice Address, 714 Lowman Building, City of  
Seattle, King County, Washington.

State of Washington,  
County of King,—ss.

Edward H. Chavelle, being first duly sworn, on oath deposes and says: That he is the petitioner named in the foregoing petition; that he has read the foregoing petition, knows the contents thereof, and the same are true, as he verily believes.

EDWARD H. CHAVELLE. [88]

Subscribed and sworn to before me this 9th day of December, 1913.

[Seal] S. G. CLIMENSON,  
Notary Public in and for the State of Washington,  
residing at Seattle.

[Endorsed]: Petition. Filed Dec. 10, 1913. 11  
a. m. John P. Hoyt, Referee. Filed U. S. Court  
July 31, 1914. [89]

*In the District Court of the United States for the  
Western District of Washington, Northern Divi-  
sion.*

IN BANKRUPTCY—No. 4717.

In the Matter of the WASHINGTON STEEL &  
BOLT COMPANY,

Bankrupt.

**Answer to Petition [of Trustee in Bankruptcy for  
Order Directing Sale of Certain Property, etc.].**

Comes now the Washington Trust Company and  
for answer to the petition filed herein for the sale of  
property of said bankrupt corporation denies and  
says as follows:

I.

Referring to paragraph III of said petition, this  
respondent denies that said mortgage is a pretended  
mortgage only, and further controverting said fact  
avers that the said mortgage is valid and has been so  
decreed to be by the Judge of the above-entitled court  
in this proceeding.

II.

Referring to paragraph IV of said petition, this  
respondent denies each and every allegation therein  
contained, and further controverting said paragraph  
avers that all the bonds issued under said trust deed  
exceeding the amount named in said paragraph are  
valid and binding obligations upon the said bankrupt  
and secured by the mortgage in said petition re-  
ferred to, and that the said bonds have been adjudged  
valid by the above-entitled court; the only question



remaining being the amount due thereon.

### III.

Referring to paragraph VII of said petition, respondent [90] denies each and every allegation therein contained.

And for a further affirmative defense to said petition, the Washington Trust Company represents as follows:

#### I.

That the total value of all the property covered by said mortgage and referred to in said petition does not exceed the sum of Ten thousand (\$10,000) dollars, as your petitioner is informed and verily believes, and that there are valid bonds outstanding secured by the mortgage upon said property, exceeding Sixty-four thousand seven hundred (\$64,700) dollars.

#### II.

That proceedings are now pending and are at issue, much testimony has been taken and the taking of testimony will soon be concluded in a proceeding instituted by the Washington Trust Company for the foreclosure of said mortgage, and that a decree of foreclosure may be expected within thirty (30) days.

#### III.

That the mortgagee has the right in bidding upon said property at said foreclosure sale to use, for the purpose of bidding, the bonds which are being foreclosed, and that each bondholder has the right to use his bonds in making his bid; that to have the said property sold on the eve of the entry of a decree of foreclosure would defeat the objects and purpose of

said foreclosure suit and would deprive this respondent and the bondholders of the fruits of their said foreclosure and from the right to use, in bidding at said sale, the mortgage and bonds.

IV.

That the said property has been standing unused for ——— years, and that the same will not deteriorate and will not depreciate in value until the rainy season begins again [91] in the fall.

V.

That the general creditors of the Washington Steel & Bolt Company have no interest or equity in the said lands and premises, because the amount due under said trust deed exceeds the value of all the property covered thereby, and that the less that is obtained for the said property the greater will be the loss to the creditors; that if the said Washington Trust Company is permitted to use the said bonds in said sale a very much larger sum will be realized through the proceeds thereof.

Wherefore, this respondent prays that the petition filed herein by the trustee of the above-named bankrupt for the sale of said property be denied.

JAMES B. MURPHY,

Attorney for Washington Trust Co.

State of Washington,

County of King,—ss.

James B. Murphy, being first duly sworn, on oath deposes and says: That he is the attorney for Washington Trust Company, the respondent named in the foregoing answer, and makes this verification in its behalf for the reason that none of its officers is now



present; that he has read the foregoing answer knows the contents thereof and believes the same to be true.

JAMES B. MURPHY,

Subscribed and sworn to before me this 11th day of April, A. D. 1914.

JNO. R. WILSON,

Notary Public in and for the State of Washington,  
Residing at Seattle.

Copy of the within answer received this 11th day of April, 1914.

J. W. RUSSEL,

Attorney for Trustee.

[Indorsed]: Answer to Petition. Filed April 13, 1914. 2 p. m. John P. Hoyt, Referee. Filed U. S. Court July 31, 1914. [92]

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**[Order of Referee Directing Sale of Certain  
Property, etc.]**

*In the United States District Court for the Western  
District of Washington, Northern Division.*

No. 4717.

In the Matter of WASHINGTON STEEL &  
BOLT COMPANY, a Corporation,  
Bankrupt.

**ORDER DIRECTING SALE FREE AND CLEAR  
OF LIENS.**

An order having been heretofore made herein requiring the Washington Trust Company, and all creditors of the above-named bankrupt, to show cause

before this court, at the office of Hon. John P. Hoyt, Referee, why an order should not be made herein, directing that all the property, now in the possession of said Trustee and mentioned and described in the petition filed therefor, be sold in the manner prescribed by the acts of Congress relating to bankruptcy and the General Orders of the Supreme Court of the United States, free of and from the lien of the mortgage held by the Washington Trust Company, and free of and from all liens, and why the proceeds arising of and from said sale should not be held by the said Trustee subject to the lien of said mortgage (provided the same was held a valid and subsisting lien), to all intents and purposes as though the said property had not been sold; subject to the final order, judgment and decree of this Court as to the validity, *bona fides* and extent of the said mortgage, and for other and further relief,

Now, upon reading and filing the said order to show cause; and upon the petition of Edward H. Chavelle, Trustee, theretofore filed herein; and upon the petition in bankruptcy herein, the testimony taken under said petition and the answer of the said the Washington Trust Company.

And after hearing counsel for the Trustee in favor thereof, and counsel for said The Washington Trust Company in opposition thereto—the creditors of said bankrupt having appeared and urged the granting of the prayer of said petition—and it appearing to the [93] satisfaction of this Court that the best interests of the creditors of the said bankrupt above-named will be subserved by the granting of said ap-



plication, and for divers other reasons that the said application is proper, it is hereby

ORDERED, ADJUDGED and DECREED that Edward H. Chavelle, as Trustee of Washington Steel & Bolt Company, Bankrupt, be, and hereby is authorized, directed and permitted to sell and dispose of, in the manner and mode prescribed by the acts of Congress relating to bankruptcy and the General Orders of the Supreme Court of the United States, all of the property of the Washington Steel & Bolt Company, bankrupt, situate and located at Edmonds, Snohomish County, Washington, and more particularly described in a certain indenture of mortgage heretofore made by Washington Steel & Bolt Company to the Washington Trust Company to secure an issue of \$200,000 of bonds, dated September 1, 1908, and recorded on the — day of September, 1908, in Book — of Mortgages at page —, in the office of the Auditor of Snohomish County, Washington.

And it further Ordered, Adjudged and Decreed that the said Edward H. Chavelle, as Trustee, be, and he thereby is authorized, directed and permitted to sell and dispose of the said property in said mortgage more particularly mentioned and described, free of and from the lien thereof, and that the proceeds arising from the sale of said property be held by the said Trustee subject to the lien of said mortgage, as if said property had not been sold, subject to the final order, judgment and decree of this Court adjudicating the validity, *bona fides* and extent of the said mortgage.

Dated July 28, 1914.

JOHN P. HOYT,  
Referee in Bankruptcy.

Receipt of a copy and due service hereof admitted this 28th day of July 1914.

JAMES B. MURPHY, M. B. S.

Attorney for Petitioner.

[Endorsed]: Order directing sale free and clear of liens. Filed July 28, 1914, at 2 o'clock P. M. John P. Hoyt, Referee. Filed in the U. S. District Court, Western District of Washington, Jul. 31, 1914. Frank L. Crosby, Clerk. [94]

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**[Petition of Washington Trust Co. for Review of  
Order of Referee in Bankruptcy of July 28, 1914.]**

*In the District Court of the United States, in and for  
the Western District of Washington, Northern  
Division.*

No. 4717.

In the Matter of the WASHINGTON STEEL &  
BOLT COMPANY, a Corporation,  
Bankrupt,

**PETITION FOR REVIEW.**

To the Honorable Referee in Bankruptcy:

COMES NOW your petitioner, the Washington Trust Company, and feeling itself aggrieved by the order entered herein on the 28th day of July, 1914, directing and authorizing the Trustee in Bankruptcy to sell the property of the above-entitled Bankrupt free and clear of the encumbrance of the mortgage or trust deed executed by the Washington Steel & Bolt Company to the Washington Trust Company, under date of September 1, 1908, which deed was delivered on September 9, 1908, hereby petitions for a review



of the whole and every part of said order and all matters touching or concerning the same, and as grounds for review your petitioner respectfully represents as follows:

I.

That the Referee in Bankruptcy erred in reciting that the creditors of said Bankrupt appeared and urged the granting of the prayer of the petition of the trustee in Bankruptcy for the sale of said property.

II.

That the said Referee in Bankruptcy erred in reciting that it appeared satisfactorily to the court that the best interests of the creditors of the said Bankrupt would be subserved by the granting of said petition to sell said property. [95]

III.

That the said Referee in Bankruptcy erred in ordering, adjudging and decreeing that the Bankrupt be authorized and directed and permitted to sell and dispose of the property of the Washington Steel & Bolt Company located at Edmonds, more particularly described in the said trust deed and mortgage.

IV.

That the said Referee in Bankruptcy erred in ordering, adjudging and decreeing that Edward H. Chavelle, as Trustee of the said bankrupt and its estate, be authorized and directed and permitted to sell and dispose of said property free from any lien of the mortgage and trust deed herein referred to, and directing that the said lien, if any there be, attach to the proceeds of said sale.

V.

That the said Referee in Bankruptcy erred in denying the prayer of the said petitioner for the sale of the property.

VI.

That the said Referee in Bankruptcy erred in passing upon said petition before the validity of said mortgage was finally determined, thus prejudicing the rights of the mortgagee in bidding at said sale and denying it the fruits of its recovery if the mortgage and bonds were found valid.

WHEREFORE, your petitioner prays that the Honorable Referee in Bankruptcy certify to the above-entitled court for review the testimony, matters and things pertaining to and relating to the hearing of the said petition for the sale of said property, and that the court review the same and reverse said order, and that your *petitioner* have such other and further relief as the court may deem meet and equitable.

JAMES B. MURPHY,

Attorney for Washington Trust Company. [96]

State of Washington,

County of King,—ss.

James B. Murphy, attorney for the above-entitled petitioner named in the foregoing petition, does make solemn oath and states that the foregoing petition is true according to his best knowledge and information, and believes and further certifies that said petition, in his opinion, is well founded in point of law and that it is not interposed for delay.

JAMES B. MURPHY,



Subscribed and sworn to before me this 30th day of July, 1914.

[Seal]

W. D. LANE,  
Notary Public in and for the State of Washington,  
Residing at Seattle, County and State Aforesaid.

[Endorsed]: Petition for Review. Filed July 31st, 1914, 9 A. M. John P. Hoyt, Referee. Filed July 31, 1914. U. S. District Court. [97]

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**[Opinion of Neterer, D. J., Filed September 5, 1914.]**

*United States District Court, Western District of  
Washington, Northern Division.*

No. 4717.

In the Matter of the WASHINGTON STEEL &  
BOLT COMPANY,

Bankrupt,

Filed Sept. 15, 1914.

ON PETITION TO REVIEW ORDER OF  
REFEREE, ORDER MODIFIED.

James B. Murphy, For Petitioner.

J. W. Russel, For Trustee.

NETERER, District Judge:

This case has been before the Court on two or three prior occasions, and the last hearing was upon a petition to review the order of the Referee in which he held the mortgage in issue to be invalid. The court reversed the order of the Referee and held the mortgage valid because it was regularly signed by the Secretary and President of the corporation and authenticated by the corporate seal which was affixed,

and its execution was admitted by the trustee. As to the issuance of the bonds, the Court expressed some view of the bonds under the testimony submitted, but said:

“I am unable to determine from the testimony the amount of the bonds that were legally issued,” and remanded the same to the Referee, with instructions,

*“to ascertain the amount and status of all bonds and report to the Court, to the end that all parties may receive equal protection.”*

The testimony has been submitted to the Referee by all contending parties as to the legal status of the bonds. Upon the conclusion of the hearing, the Referee held that none of the bonds had been legally issued; that they were invalid and therefore not claims against the bankrupt estate, and also entered an order directing the property to be sold free and clear of all indebtedness. This order and the order [98] holding the bonds invalid, are before the court at this time.

From a consideration of all of the evidence presented I am of the opinion that \$23,400.00 of bonds issued to McPhaden, and the \$2,900.00 of bonds issued to Pike, issued for past indebtedness to Pike and McPhaden for monies advanced by them to the corporation long prior to the date of the bonds, and transferred to the Bank of Montreal as collateral security for money paid to the company, are liabilities to the extent of the advances. There were also regularly issued: to C. F. Chapin, \$2,500.00; Meta McElroy, \$2,000.00; J. H. Osborne, \$5,900.00; and



Thomas S. Burley, \$2,600.00. The bonds issued to these last-named parties were upon considerations paid by these several parties to McPhaden who paid that money to the Washington Steel & Bolt Company which he was representing, and it was used by this company in the regular course of business, and all benefits arising from such payments accrued to the corporation. These several parties having thus paid their money upon the faith and credit of these bonds and the mortgage, should not now be deprived of the benefits accruing by reason of such security, after the corporation had used their money, some of which, perhaps, now representing some of the assets. The contention that the bonds are void because of the fact that a commission was paid to the person negotiating the bonds cannot be well founded as against the parties who paid ninety-five cents on the dollar, which the testimony shows these several parties did, except as to the bank holding the bonds issued to McPhaden and Pike as collateral security.

The \$25,000.00 bonds issued to the Bank of Montreal as collateral security, I do not think are a valid claim. The bonds were delivered without any authority, either fact [99] or law. There is no testimony before the Court that the delivery of these bonds was ever authorized in a legal manner, and if a proper resolution had been passed, the authority under which the bonds were executed did not comprehend the issuance of bonds for any such purpose.

I think the findings and conclusions of the Referee should be modified in so far as they relate to the \$23,400.00 of bonds issued to McPhaden, and the

bonds issued to C. F. Chapin, Meta McElroy, J. H. Osborne, Thomas S. Burley and Pike. I think that the property should be sold, and the proceeds applied to the payment of the claims of the Bank of Montreal, to the extent of its interest in the McPhaden and Pike bonds held as collateral, and also the bonds of Chapin, McElroy, Osborne and Burley, less such proportion of the expenses as should be paid by said interests in this bankruptcy proceeding, and the balance, if any, less expenses of administration, to be distributed among the general creditors, as provided by the Bankruptcy Act.

Let an order be presented.

JEREMIAH NETERER,

Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Sep. 15, 1914. Frank L. Crosby, Clerk. By S. E. Leitch, Deputy. [100]

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**[Order Modifying Order of Referee of July 20, 1914, etc.].**

*In the United States District Court for the Western District of Washington, Northern Division.*

No. 4717.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY, a Corporation,

Bankrupt.

ORDER ON REVIEW FROM ORDER OF  
REFeree.

This matter having been brought before the refe-



ree by the petition of The Washington Trust Company for leave to foreclose a certain mortgage, executed by the bankrupt, outside of the bankruptcy court; and therefore having granted leave to so foreclose upon terms; and the petitioner, The Washington Trust Company, having taken a review from said order; and this Court having reversed said order, directed the mortgage, if valid, to be foreclosed in the bankruptcy court, and send the matter back to the referee to take proofs as to the validity of said mortgage and the bonds issued thereunder; and proofs having been offered before the referee as to the validity of said mortgage, but not as to the validity of said bonds; and said referee having made and entered an order declaring said mortgage invalid; and the petitioner, The Washington Trust Company, having taken a review from said order to this court; and this court having held said mortgage valid, reversed said order; and sent the matter back to the Referee to take proof as to the validity of said bonds, and to make findings and conclusions thereon; and said Referee having taken such proofs, and having made findings and conclusions thereon, and having made and entered an order on the 20th day of July, 1914, declaring all of said bonds invalid, and rejecting, disallowing and expunging the claim of the petitioner, the Washington Trust Company, based thereon, from the records; and said petitioner having filed exceptions to said findings and conclusions, and having taken a review from said order to this Court; and the matters raised by said review having been heard and considered by this court.

IT IS ORDERED that said report and order of July 20, 1914, be, and the same hereby is, modified to the extent of holding that \$1,000 of the bonds held by C. F. Chapin, and the \$2,000 of bonds held by Meta [101] McElroy, and the \$7,000 of bonds held by J. H. Osborne are valid, and as so modified said order is hereby confirmed.

The trustee in bankruptcy duly excepts to such modification, and his exception is hereby allowed.

And the property covered by said mortgage having been ordered sold free and clear from the lien thereof.

IT IS HEREBY FURTHER ORDERED that the proceeds thereof be paid to Washington Trust Co. on account of the claims of said Chapin, McElroy and Osborne, less such proportion of the expenses and costs as should be paid by said interests in this proceeding, and that the balance thereof, if any, less expenses of administration, be distributed among the creditors, as provided by the Act.

Oct. 16, 1914.

JEREMIAH NETERER,

Judge.

Receipt of a copy and due service hereof admitted this 14th day of October, 1914.

JAMES B. MURPHY,

Attorney for Petitioner.

[Indorsed]: Order on Review from Referee's Order. Filed in the United States District Court, Western District of Washington, Oct. 16, 1914, *Oct. 16, 1914*. Frank L. Crosby, Clerk. By B. E. S., Deputy. [102]



**[Order Confirming Order of Referee of July 28, 1914,  
etc.].**

*In the District Court of the United States for the  
Western District of Washington, Northern  
Division.*

No. 4717.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY, a Corporation,

Bankrupt.

**ORDER ON REVIEW FROM REFEREE'S  
ORDER.**

This matter having been brought before the referee upon the petition of the Trustee for leave to sell the property of the bankrupt estate free and clear from the mortgage thereon; and the Referee having made and entered an order on the 28th day of July, 1914, granting leave to the Trustee to so sell said property free and clear; and the Washington Trust Company having taken a review from said order to this Court; and the matters raised by said review having been heard and considered by this Court.

IT IS ORDERED that said order of the referee be, and the same is, hereby confirmed.

And it is hereby further ORDERED that no bid for said property be accepted until its acceptance is authorized by this court.

Oct. 16, 1914.

JEREMIAH NETERER,  
Judge.

Receipt of a copy and due service hereof admitted this 14th day of October, 1914.

JAS. B. MURPHY,  
Attorney for Petitioner.

[Indorsed]: Filed in the United States District Court, Western District of Washington. Oct. 16, 1914. Frank L. Crosby, Clerk. By B. E. S., Deputy. [103]

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**[Form of Decree Proposed by Washington Trust Co.  
and Refusal of Court to Sign Proposed Decree,  
etc.].**

*In the District Court of the United States in and for  
the Western District of Washington, Northern  
Division.*

No. 4717.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY, a Corporation,  
Bankrupt.

**PROPOSED DECREE AND REFUSAL OF  
COURT TO SIGN SAME.**

THE WASHINGTON TRUST COMPANY requests the incorporation in the Order of the Court, each (severally), of the following provisions:

This matter having been presented to this Court, upon the petition to review the Findings and Conclusions and Judgment of the Referee in passing upon the validity of the bonds issued by the Washington Steel & Bolt Company, which judgment was entered by the Referee on July 20, 1914, and upon petition for the review of the Order of the Referee



on July 28, 1914, made herein, directing a sale of the mortgaged property for cash, free and clear of the encumbrance of said mortgage, and the Court having duly considered the said petitions and the arguments made in support thereof, and becoming fully advised in the premises; Now, therefore,

1. IT IS HEREBY ORDERED, ADJUDGED and DECREED that the said Findings made by the Referee herein, and the whole of said Findings, as well as the Conclusions deduced therefrom, be and the same are overruled, vacated and set aside, and

2. IT IS FURTHER ORDERED, ADJUDGED and DECREED that said Order and Judgment, and the whole thereof, entered herein by the said Referee, holding that the bonds issued by the above Bankrupt were void and of no effect, and denying the prayer of the Washington Trust Company, and holding that the claim of the Washington Trust Company be rejected and disallowed and expunged from the list [104] of claims, which order was entered on July 20, 1914, be and the same is hereby vacated and set aside, and

3. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the order entered herein on July 28, 1914, by the said Referee directing and ordering a sale of the property of the Washington Steel & Bolt Company for cash, free and clear of the encumbrance of said mortgage, be and the same is hereby overruled and set aside.

4. IT IS FURTHER ORDERED, ADJUDGED and DECREED that those certain bonds filed as exhibits herein on behalf of the Bank of Montreal and

numbered 661 and 663, 667 to 671, each inclusive; 674 to 690, each inclusive; 695 and 699, being twenty-six (26) bonds of the denomination of \$500.00 each and of the total par value of \$13,000.00; bonds numbered 702 and 704, being two bonds of the denomination of \$1,000.00 each, making a total par value of \$2,000.00; bonds numbered 291 to 300, each inclusive, being ten bonds of the denomination of \$100.00 each, making a total par value of \$1,000.00; bonds numbered 399 to 407, each inclusive, being nine bonds of the denomination of \$100.00 each, making a total par value of \$900.00; bonds numbered 691 to 694, each inclusive, being four bonds of the denomination of \$500.00 each, making a total par value of \$2,000.00; bonds numbered 665, 666, 672, 673, being four bonds of the denomination of \$500.00 each, making a total of \$2,000.00; bonds numbered 703 and 707 being two bonds of the denomination of \$1,000.00 each, making a total par value of \$2,000.00, all of which bonds are held by the Bank of Montreal and are of the total par value of \$22,900.00, are, as to the Bank of Montreal, valid and existing obligations of the Washington Steel & Bolt Company, and secured by the trust deed hereinafter described to the extent of the money due from the Washington Steel & Bolt Company to the Bank of Montreal, a corporation. [105]

5. IT IS FURTHER ORDERED, ADJUDGED and DECREED, for the apportionment and distribution of the property or proceeds of the sale hereinafter provided for as between the holders of bonds, that the bonds held by the Bank of Montreal rep-



resent an indebtedness, including interest, of \$31,012.66.

6. IT IS FURTHER ORDERED, ADJUDGED and DECREED that those certain bonds in the possession of the Bank of Montreal issued by the Washington Steel & Bolt Company and numbered 705, 708 to 716, each inclusive, and 718 to 732, each inclusive, making 25 bonds each of the denomination of \$1,000.00, making a total par value of the sum of \$25,000.00, which bonds are those delivered direct by the Washington Steel & Bolt Company to said bank, are valid and existing obligations of the Washington Steel & Bolt Company as security for the indebtedness of said Washington Steel & Bolt Company to said Bank of Montreal.

7. IT IS FURTHER ORDERED, ADJUDGED and DECREED, for the purpose of apportioning the proceeds of said sale among the Bank of Montreal and the owners of the other bonds, that the said bonds last hereinbefore described shall be estimated at their face value of \$25,000.00 and accrued interest amounting to the sum of \$——.

8. IT IS FURTHER ORDERED, ADJUDGED and DECREED that there is now due and owing from the Washington Steel & Bolt Company to the Bank of Montreal the full and just sum of \$20,000.00, together with the interest thereon at the rate of eight per cent (8%), per annum from the 23d day of December, 1910, making a total to this date of principal and interest of the sum of \$26,033.30, and that the said indebtedness is secured by the bonds hereinbefore mentioned and held to be valid.

9. IT IS FURTHER ORDERED, CONSIDERED AND DECREED that J. H. Osborne is the owner of the following bonds of said issue, which bonds are upon file as exhibits herein; numbers 410 to 438, each inclusive, being 29 bonds of the denomination of \$100.00 each, making a total par value of \$2,900.00; bonds numbered 655 [106] to 660, each inclusive, being six bonds of the denomination of \$500.00 each, making a total par value of \$3,000.00, bond numbered 409 of the denomination of \$100.00, bonds numbered 653 and 654 of the denomination of \$500.00 each, making a total par value of \$1,100.00, making a grand par value total of \$7,000.00; that interest has been paid on the bonds held by the said Osborne as aforesaid to the first day of March, 1912, and to no later date, and that there is now due and owing to the said Osborne, represented by said bonds, the sum of \$7,000.00, together with interest thereon at the rate of 8% per annum from the first day of March, 1912, making a total to this date of principal and interest of the sum of \$8,446.17.

10. IT IS FURTHER ORDERED, ADJUDGED and DECREED that C. F. Chapin is the owner of the following described bonds of said issue, to wit: bonds numbered 696 to 698, each inclusive, being three bonds of the denomination of \$500.00 each and representing a total par value of \$1,500.00, and bonds numbered 662 and 664, being two bonds of the denomination of \$500.00 each, totaling \$1,000, and making a grand total of \$2,500.00, that interest on said bonds belonging to the said Chapin has been paid to September 1, 1911, and to no later date, and



that there is now due and owing on account of said bonds to the said Chapin from the said Washington Steel & Bolt Company the sum of \$2,500.00, together with interest thereon at the rate of eight per cent (8%) per annum from the first day of September, 1911, making a total due to the said Chapin on this date of the sum of \$3,116.66.

11. IT IS FURTHER ORDERED, CONSIDERED, ADJUDGED and DECREED that Meta McElroy is the owner of the following bonds of said issue, to wit: bond numbered 700 of the par value of \$500.00, bond numbered 706 of the par value of \$1,000.00, bonds numbered 439 to 442, each inclusive, being four bonds of the par value of \$100.00 each, making a total of \$400.00, and bond numbered 446 of the par [107] value of \$100.00, making a grand total of \$2,000.00, and that there is now due and owing from the said Washington Steel & Bolt Company to the said Meta McElroy, on account of the execution and delivery of the said bonds, the sum of \$2,000.00, together with the interest thereon at the rate of eight per cent (8%) per annum from the first day of September, 1911, making a total due to the said Meta McElroy on this date of the sum of \$2,493.33.

12. IT IS FURTHER ORDERED, ADJUDGED and DECREED that Thomas S. Burley is the owner of the following bonds of said issue, to wit; bonds numbered 443 to 445, each inclusive, being three bonds of the par value of \$100.00 each, totaling \$300.00, and bonds 498 to 500, each inclusive, being three bonds of the par value of \$100.00 each, totaling

\$300.00, and bonds 701 and 717, being two bonds of the par value of \$1,000.00 each, totaling \$2,000.00, making a grand total of \$2,600.00 par value, that interest has been paid upon said bonds to the first day of September, 1911, and to no later date, and that there is now due and owing the said Burley from the said Washington Steel & Bolt Company, on account of the execution and delivery of the said bonds, the sum of \$2,600.00, with interest thereon, at the rate of eight per cent (8%) per annum from the first day of September, 1911, making the sum due at this date of \$3,241.33.

13. IT IS FURTHER ORDERED, ADJUDGED and DECREED that the bonds held by the bank of Montreal, and particularly described in Paragraph 4 hereof, are hereby established as a valid, existing obligation of the said Washington Steel and Bolt Company, and secured by that certain trust deed and mortgage hereinbefore held valid, signed by the Washington Steel & Bolt Company under date of September 1, 1908, and acknowledged under date of September 9, 1908, and recorded in the Auditor's office of Snohomish County, State of Washington, in Volume 69 of Mortgages, at Page 388, Record of Mortgages of said Snohomish County.

14. IT IS FURTHER ORDERED, ADJUDGED and DECREED THAT THE [108] bonds held by the Bank of Montreal, and particularly described in Paragraph 6 hereof, are hereby established as a valid, existing obligation of the said Washington Steel & Bolt Company and secured by that certain trust deed and mortgage hereinbefore held valid,



signed by the Washington Steel & Bolt Company under date of September 1, 1908, and acknowledged under date of September 9, 1908, and recorded in the Auditor's office of Snohomish County, State of Washington, in Volume 69 of Mortgages, at Page 388, Record of Mortgages of said Snohomish County.

15. IT IS FURTHER ORDERED, ADJUDGED and DECREED that the bonds held by J. H. Osborne, and particularly described in Paragraph 9 hereof, are hereby established as a valid, existing obligation of the said Washington Steel & Bolt Company and secured by that certain trust deed and mortgage hereinbefore held valid, signed by the Washington Steel & Bolt Company under date of September 1, 1908, and acknowledged under date of September 9, 1908, and recorded in the Auditor's office of Snohomish County, State of Washington, in Volume 69 of Mortgages at Page 388, Record of Mortgages of said Snohomish County.

16. IT IS FURTHER ORDERED, ADJUDGED and DECREED that the bonds held by C. F. Chapin, and particularly described in Paragraph 10 hereof, are hereby established as a valid, existing obligation of the said Washington Steel & Bolt Company and secured by that certain trust deed and mortgage hereinbefore held valid, signed by the Washington Steel & Bolt Company under date of September 1, 1908, and acknowledged under date of September 9, 1908, and recorded in the Auditor's office of Snohomish County, State of Washington, in Volume 69 of Mortgages, at Page 388, Record of Mortgages of said Snohomish County.

17. IT IS FURTHER ORDERED, ADJUDGED and DECREED that the bonds held by Meta McElroy, and particularly described in Paragraph 11 hereof, are hereby established as a valid, existing [109] obligation of the said Washington Steel & Bolt Company and secured by that certain trust deed and mortgage hereinbefore held valid, signed by the Washington Steel & Bolt Company under date of September 1, 1908, and acknowledged under date of September 9, 1908, and recorded in the Auditor's office of Snohomish County, State of Washington, in Volume 69 of Mortgages, at Page 388, Record of Mortgages of said Snohomish County.

18a. IT IS FURTHER ORDERED, ADJUDGED and DECREED that the bonds held by Thomas S. Burley, and particularly described in Paragraph 12 hereof, are hereby established as a valid, existing obligation of the said Washington Steel & Bolt Company and secured by that certain trust deed and mortgage hereinbefore held valid, signed by the Washington Steel & Bolt Company under date of September 1, 1908, and acknowledged under date of September 9, 1908, and recorded in the Auditor's office of Snohomish County, State of Washington, in Volume 69 of Mortgages, at Page 388, Record of Mortgages of said Snohomish County.

18b. IT IS FURTHER ORDERED, CONSIDERED and ADJUDGED that the Trustee must elect whether he will administer the equity of redemption in the property for the benefit of general creditors or surrender the mortgaged property for foreclosure.

If the Court refuses to incorporate 18b in its Order,



we further, without prejudice to urging our right to have said paragraph inserted, propose the incorporation of the following:

19. IT IS FURTHER ORDERED, ADJUDGED and DECREED that the personal property referred to herein, particularly described as follows, to wit:

One *Agax* Pressed nut machine 16 ton.

One Acme nut tapper 2.

One Acme nut tapper 1.

One Aligator Shear.

One Acme heading and forging machine 1.

One Acme heading and forging machine 2.

One Acme threading machine 2.

One Acme threading machine 1.

One Acme pointing machine.

One 70 H.P. boiler Erie City manufacture.

One 60 H. P. engine.

\$6,000.00 worth of dies, in die houses on below described real estate. One Burring machine. Waterworks, hose, electric light plant. A complete oil pumping station with heaters, double strainer, together with pipings and Rockwell oil burners for boiler, and also one three ton tumbler. Blacksmithing outfit such as vises, anvils, emery stands, tongs, hammers, drills, punches, etc. All leather endless belting, and any other belting owned and used by said Washington Steel & Bolt Company in and about its said bolt factory. All pulleys owned by said Washington Steel & Bolt Company used in and about said bolt plant, all of the same being of steel material. All roller bearings for shaftings 120 feet or more long. All office furniture [110] and fixtures,

among other things, including desk, filing cabinet, typewriter, steam heating apparatus, situate and being in the office of said company, which said office building is now located upon the above-described real estate.

Two hot blast furnaces. One oil tank, capacity 500 barrels. Platform scales. Also one United States patent known as the Climo Rail Joint Patent #755848, issued on the 29th of March, 1904, together with all rights and privileges thereto connected or in anywise belonging, also one United States Patent #740257, known as the Owen-Shaw Nut and Bolt Locks, together with all rights and privileges thereto belonging.

And all other personal property of every name and nature now owned and possessed by the Washington Steel & Bolt Company except the cash which is in the hands of the Trustee in Bankruptcy as proceeds of the sale of certain manufactured stock and raw material.

And the real property herein referred to, situated in Snohomish County, State of Washington, and particularly described as follows:

“Beginning at the point of intersection of section line between sections twenty-three (23) and twenty-six (26), Township twenty-seven (27) North, Range Three (3) East of W. M., with the center line of the Great Northern Railroad right of way; thence angle west to south 48 degrees 46 minutes (magnetic course south 40 degrees 56 minutes west), along the center line of the Great Northern right of way, 339.5 feet; thence angle right 46 degrees 17 minutes a distance



of 69.18 feet to the true place of beginning. Thence same course 395.8 feet. Thence angle left 64 degrees, 25 minutes, 290.58 feet; thence angle left 115 degrees 33 minutes 362.5 feet to the place of beginning, containing 2.004 acres, also all the abutting tide lands in front of the above described premises amounting to about six (6) acres, or about eight (8) acres in all, situated in the County of Snohomish, State of Washington."

"Beginning at a point on the westerly line of the right of way of the Seattle & Montana Railway Right of Way 852 feet south of the intersection of said Right of Way and the south line of Section Twenty-three (23) Township Twenty-seven (27) North Range Three (3) East and running thence north (250) two hundred fifty feet; thence S. 87 degrees 13' W. to the shore of Puget Sound. Thence southerly along the shore of Puget Sound to a point bearing S. 87 degrees 13' W. of the place of beginning; thence N. 87 degrees 13' E. to the place of beginning, being a strip of land 250 feet in length North and South along said Right of Way and extending to the shore of Puget Sound.

Also all that portion of tideland Lot No. 1 in front of Section 26, Tp. 27, R. 3 E. in front of the town of Edmonds and more particularly described as follows: The first class tidelands lying in front of the following described upland; Beginning at a point on the westerly line of the right of way of the Seattle and Montana Railway right of way 952 feet south of the intersection of said right of way and the south line of Sec. 23, Tp. 27, N. R. 3 E. and running

thence North 250 feet; thence south 87 degrees 13' W. to the shore of Puget Sound; thence southerly along the shore of Puget Sound to a point bearing S. 87 degrees 13' W from the place of beginning, ~~being a strip of land 250 feet in length~~ thence N. 87 degrees 13' east to the place of beginning, being a strip of land 250 feet in length north and south along said right of way. Said portion of tideland Lot No. 1 being bounded by the Government Meander Line and the [111] river Harbor line and the N. and S. boundary line of above upland description produced out in the same direction to the river harbor line containing 0.99 acre more or less, according to the official map on file in the office of the Commissioner of Public Lands at Olympia, Washington."

and all other real property or interest in real property which the said Washington Steel & Bolt Company owns, be sold by the Trustee in Bankruptcy in accordance with the practice of this Court, and that the proceeds of said sale shall be applied, first to such portion of the expenses in this bankruptcy proceeding as should be paid by the holders of the said bonds, then in payment of the proper charges of said Washington Trust Company, and then to the satisfaction of the bonds held by the Bank of Montreal to the extent of the indebtedness of the Washington Steel & Bolt Company as adjudged herein and to the payment and satisfaction of the bonds held by the said Osborne, Chapin, McElroy and Burley, paying proportionately on all valid bonds.



20. IT IS FURTHER ORDERED, CONSIDERED, ADJUDGED and DECREED that any balance remaining after the application of the proceeds of said sale, as set out in the preceding paragraph, shall be paid to A. McPhaden and A. G. Pike, according to their respective interests in the bonds held by the Bank of Montreal.

21. IT IS FURTHER ORDERED, CONSIDERED, ADJUDGED and DECREED that any holder or holders of the bonds or coupons secured by this mortgage, according to the terms of this decree, if successful as bidder or bidders at said sale, may, after first paying in enough to cover all proper and lawful charges and demands which may be made by the Trustee, the Washington Trust Company, including its compensation and the compensation of its attorneys, and also paying in such portion of the expenses of this bankruptcy proceeding as should be paid by the holders of said bonds, use such bonds and coupons to apply toward the payment of the purchase money, reckoning and computing the said bonds and coupons at a sum equal to and not exceeding that which would be payable to such bondholder or holders as such out of the net proceeds of such sale if made [112] for cash.

22. IT IS FURTHER ORDERED, ADJUDGED and DECREED that the Washington Trust Company may, as trustee for the holders of said bonds, with their consent, after first paying in money sufficient to cover such portion of the expenses of this bankruptcy proceeding as should be paid by the bondholders, become a bidder at said sale and may

use, in making settlement for and in payment of the purchase money to account to the Trustee in Bankruptcy, any and all of the bonds or coupons secured by said mortgage and held valid by this decree, and may use and apply the same in and toward the payment of the purchase money reckoning and computing said bonds and coupons at a sum equal to and not exceeding that which would be payable out of the net proceeds of said sale, were the purchase price paid in cash, to the holders of such used bonds.

23. IT IS FURTHER ORDERED, ADJUDGED and DECREED, inasmuch as the proper portion of the expenses of this bankruptcy proceeding to be paid by the holders of the bonds is not ascertained, or fixed, that all bidders at said sale should be required to pay the sum of \$——, portion of the bid to cover any and all possible proper charges and expenses, and any amount remaining of said sum not used in the payment of proper charges and expenses, shall be applied as other parts of the bid are directed to be applied according to the terms of this decree, and in the event that the successful bidder is some one other than the Washington Trust Company and a holder of bonds, such bidder shall pay in, at least, the sum of \$—— in cash to cover the lawful charges, including compensation and compensation of its attorneys, of the said Washington Trust Company.

DONE in open court this —— day of October, 1914.



The provisions of the foregoing Order or Decree were, at the time of the signing of the Order herein pertaining to this subject matter, separately presented to the Court, and a separate request was made as to each provision hereof, to have it embodied in the Order, and that the Court considered separately each of the foregoing provisions and declined to embody each or any thereof in its Decree or Order and the attorney for the Washington Trust Company duly and at the time excepted to the Court's refusal so to do as to each paragraph and provision and excepted to the Court's refusal to embody Paragraphs numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, and his exceptions as to each paragraph or provision is hereby allowed.

DONE in open court this 16th day of October, 1914.

JEREMIAH NETERER,

Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington. Oct. 16, 1914. Frank L. Crosby, Clerk. By B. E. S., Deputy.  
[114]

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*In the District Court of the United States in and for  
the Western District of Washington, Northern  
Division.*

No. 4717.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY, a Corporation,

Bankrupt.

**Exceptions [of Washington Trust Co. to Approval of Findings and Report of Referee.]**

COMES NOW the Washington Trust Company, by its Attorney, the undersigned, at the time of the signing of the Order by the above-entitled court, passing upon the Petition of said Washington Trust Company, reviewing the Findings and Report of the Referee in this matter, which Findings and Report were made by the Referee on July 20, 1914, and excepts to the Court's ruling as follows:

**I.**

The Washington Trust Company excepts to the Court's refusal to sustain its exception and objection made to Finding I of said Referee.

**II.**

The Washington Trust Company excepts to the refusal of the Court to sustain its exception to Finding V of said Referee and the whole and every part thereof.

**III.**

The Washington Trust Company excepts to the Court's refusal to specifically sustain its exceptions and objection to Finding VI of the Referee.

**IV.**

The Washington Trust Company excepts to the Court's refusal to specifically sustain its exceptions and objection to Finding VII made by said Referee.  
[115]

**V.**

The Washington Trust Company excepts to the Court's refusal to specifically sustain its exception



to Finding VIII made by said Referee.

VI.

The Washington Trust Company excepts to the Court's refusal to specifically sustain its exception to Finding IX made by said Referee.

VII.

The Washington Trust Company excepts to the Court's refusal to specifically sustain its exception to Finding XI made by said Referee.

VIII.

The Washington Trust Company excepts to the Court's refusal to specifically sustain its exception to Finding XII made by said Referee.

IX.

The Washington Trust Company excepts to the Court's refusal to specifically sustain its exception to Finding XIII made by said Referee.

X.

The Washington Trust Company excepts to the Court's refusal to specifically sustain its exception to Finding XIV made by said Referee.

XI.

The Washington Trust Company excepts to the Court's refusal to specifically sustain its exception to Finding XV made by said Referee.

XII.

The Washington Trust Company excepts to the Court's refusal to specifically sustain its exception to Finding XVI made by said Referee. [116]

XIII.

The Washington Trust Company excepts to the Court's refusal to specifically sustain its exception

to Finding XVII made by said Referee.

#### XIV.

The Washington Trust Company excepts to the refusal of the Court to sustain each and every exception and objection made and contained in the Petition of the Washington Trust Company for the review of the Report of the Referee made on July 20, 1914, and the order of the Referee during the sale of the property made by said Referee on July 28, 1914.

#### XV.

The Washington Trust Company excepts to the whole and every part of the order entered by the above-entitled court on the 16th day of October, 1914, and specifically to that part of said order wherein and whereby the Court confirms the report and order of the said Referee, which it reviewed, except as in said order modified.

#### XVI.

The said Washington Trust Company further excepts to that part of the order directing the proceeds of the sale to be applied upon the claims of Chapin, McElroy and Osborne, omitting any claims which the Washington Trust Company may have for its services as trustee, and its costs and commissions and expenses in the prosecution in the above-entitled action.

#### XVII.

The said Washington Trust Company excepts to that portion of said decree subjecting the proceeds of the sale of said property to a portion of the expenses and costs of the said Bankruptcy proceed-



ings and excepts to every part of said order directing the sale of the said property. [117]

### XVIII.

The Washington Trust Company further excepts to the Court's refusal to specifically sustain its objections and exceptions to Conclusion I made by said Referee.

### XIX.

The Washington Trust Company further excepts to the Court's refusal to specifically sustain its objections and exceptions to Conclusion II made by said Referee.

### XX.

The Washington Trust Company further excepts to the Court's refusal to specifically sustain its objections and exceptions to Conclusion III made by said Referee.

### XXI.

The Washington Trust Company further excepts to the Court's refusal to specifically sustain its objections and exceptions to Conclusion IV made by said Referee.

### XXII.

The Washington Trust Company further excepts to the Court's refusal to specifically sustain its objections and exceptions to Conclusion V made by said Referee.

### XXIII.

The Washington Trust Company further excepts to the Court's refusal to specifically sustain its objections and exceptions to Conclusion VI made by said Referee.

XXIV.

The Washington Trust Company further excepts to the Court's refusal to specifically sustain its objections and exceptions to Conclusion VII made by said Referee.

JAMES B. MURPHY,  
Attorney for Washington Trust Company. [118]

The foregoing exceptions were, at the time of the signing of the Order herein, considered by the Court, and said exceptions were allowed.

Oct. 16, 1914.

JEREMIAH NETERER,  
Judge.

[Endorsed]: Exceptions. Filed in the United States District Court, Western District of Washington. Oct. 16, 1914. Frank L. Crosby, Clerk. By B. E. S., Deputy. [119]

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*In the District Court of the United States in and for the Western District of Washington, Northern Division.*

No. 4717.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY, a Corporation,

Bankrupt.

**Exceptions [of Washington Trust Co. to Order  
Confirming Order of Referee Re Sale of Prop-  
erty, etc.].**

COMES NOW the Washington Trust Company, as Trustee, and hereby excepts to the Order entered by the above-entitled court this day, wherein said court



confirmed the Order of the Referee directing a sale of the property involved in the above-entitled proceeding, and further excepts to the whole and every part of said Order.

JAMES B. MURPHY,

Attorney for Washington Trust Company.

The foregoing Exception was duly presented and taken at that time of the signing of the Order herein referred to, and the exceptions allowed.

Dated this 16th day of October, 1914.

JEREMIAH NETERER,

Judge.

[Endorsed]: Exceptions. Filed in the United States District Court, Western District of Washington. Oct. 16, 1914. Frank L. Crosby, Clerk. By B. E. S., Deputy. [120]

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**[Petition for and Order Allowing Appeal of Trustee.]**

*In the District Court of the United States for the Western District of Washington, Northern Division.*

No. 4717.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY, a Corporation,

Bankrupt.

PETITION FOR APPEAL AND ORDER AL-  
LOWING APPEAL.

The Trustee of the above-named bankrupt, Edward H. Chavelle, considering himself as such trustee, and the estate of said bankrupt, aggrieved by so much of the final order and judgment herein, made and en-

tered herein on the 16th day of October, 1914, as modifies the report and order made by the referee herein on the 20th day of July, 1914, to the extent of holding that \$10,000 of the bonds issued by the Washington Steel & Bolt Company, the above-named bankrupt, viz.: \$1,000 of those held by C. F. Chapin; the \$2,000 held by Meta McElroy; and the \$7,000 alleged to be held by J. H. Osborne, are valid, does hereby appeal from that portion of said final order and judgment to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of errors filed herewith, and prays that this, his petition for appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said final order and judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated October 26, 1914.

J. W. RUSSELL,

Attorney for Trustee in Bankruptcy.

The foregoing petition for appeal is granted, and the appeal allowed.

Dated October 26, 1914.

JEREMIAH NETERER,

United States District Judge for Said District and Division. [121]

I hereby accept due and timely service of the foregoing petition for appeal this 26th day of October, 1914.

JAMES B. MURPHY,

Attorney for Petitioner, The Washington Trust Company.



[Endorsed]: Petition for Appeal and Order Allowing Appeal. Filed in the United States District Court, Western District of Washington. Oct. 26, 1914. Frank L. Crosby, Clerk. By B. E. S. Deputy.  
[122]

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*In the District Court of the United States for the Western District of Washington, Northern Division.*

No. 4717.

In the Matter of WASHINGTON STEEL & BOLT COMPANY, a Corporation,  
Bankrupt.

**Assignment of Errors [of Trustee.]**

The trustee of the above-named bankrupt, by J. W. Russell, his attorney, makes and files the following assignment of errors, in connection with his petition for appeal herein, dated October 26, 1914, and alleges that so much of the final order and judgment herein, entered on the 16th day of October, 1914, as modifies the report and order made by the referee herein on the 20th day of July, 1914, by holding and deciding that \$10,000 of the bonds issued by said bankrupt, viz.: \$1,000 of those held by C. F. Chapin; the \$2,000 held by Meta McElroy; and the \$7,000 alleged to be held by J. H. Osborne, are valid, is erroneous in the following particulars, to wit:

I.

The Court erred in holding and adjudging that any of the bonds issued by said bankrupt are valid.

II.

The Court erred in holding and adjudging that \$1,000 of the bonds issued by said bankrupt, and held by C. F. Chapin, are valid.

III.

The Court erred in holding and adjudging that the \$2,000 of the bonds issued by said bankrupt, and held by Meta McElroy, are valid.

IV.

The Court erred in holding and adjudging that \$7,000 of the bonds issued by said bankrupt, and alleged to be held by J. H. Osborne, are valid. [123]

Dated October 26, 1914.

J. W. RUSSELL,

Attorney for Trustee in Bankruptcy.

I hereby accept due and timely service of the foregoing Assignment of Errors.

Dated October 26, 1914.

JAMES B. MURPHY,

Attorney for Petitioner, The Washington Trust Company.

[Endorsed]: Assignment of Errors. Filed in the United States District Court, Western District of Washington. Oct. 26, 1914. Frank L. Crosby, Clerk. By B. E. S., Deputy. [124]



**[Petition for and Order Allowing Appeal of  
Washington Trust Co.]**

*In the District Court of the United States in and for  
the Western District of Washington, Northern  
Division.*

No. 4717.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY, a Corporation,  
Bankrupt.

**PETITION AND ORDER FOR APPEAL.**

COMES NOW the Washington Trust Company, a corporation, feeling itself aggrieved by the two final orders and judgments made and entered in the above-entitled court and cause, on the 16th day of October, 1914, wherein and whereby the said court, in one of said orders, among other things, confirmed the order of the Referee entered July 28, 1914, directing that the property of the Washington Steel & Bolt Company, the above-named bankrupt, be sold by the Trustee in Bankruptcy, and wherein and whereby the said court, in the other order confirmed in part the report, findings and judgment of the referee entered July 20, 1914, and adjudged certain bonds issued by the Washington Steel & Bolt Company valid, to the exclusion of other bonds, and in effect held other bonds issued by the Washington Steel & Bolt Company void, and sustained and confirmed in part the findings, conclusions and order of the referee holding bonds of the said bankrupt void, which order was entered on July 20, 1914, by the referee, and refused to hold

certain bonds issued by the Washington Steel & Bolt Company valid, and refused to adopt the provisions proposed by the Washington Trust Company as appropriate parts of its final order and judgment, and refusing to permit the bondholders to, in any wise or to any extent, use their bonds in answering their bids at any sale had of said property, does hereby appeal from each of said orders and judgments, and from the whole and every part of each of said judgments and orders, excepting only that part holding certain bonds valid, and from the [125] various and several orders entered in said cause prior to said final orders and judgments materially affecting the rights of the Washington Trust Company, to the Circuit Court of Appeals of the United States for the Ninth Circuit, for the reasons and upon the grounds set forth in the assignment of errors which is filed herein, and prays that this petition for said appeal may be allowed, and that a transcript of the record, proceedings and papers, upon which the said final order and decree was made, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit. Your petitioner further prays that an order be made fixing the amount of security to be given and furnished for said appeal.

JAMES B. MURPHY,

Solicitor for Washington Trust Company.

**[Order Fixing Amount of Bond on Appeal of  
Washington Trust Co.]**

The foregoing petition for appeal is granted and an appeal is allowed, and the amount of the bond upon said appeal is hereby fixed at the sum of \$1,000, which



bond when executed, conditioned as provided by law and the rules of the Circuit Court of Appeals, shall be a cost bond.

JEREMIAH NETERER,

Judge.

Due service of the within Petition and Order acknowledged and a true copy received this 24th day of Oct., 1914.

J. W. RUSSELL,

Attorney for Trustee in Bankruptcy.

[Endorsed]: Petition and Order for Appeal. Filed in the United States District Court, Western District of Washington. Oct. 26, 1914. Frank L. Crosby, Clerk. By B. E. S., Deputy. [126]

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*In the District Court of the United States in and for the Western District of Washington, Northern Division.*

No. 4717.

In the Matter of WASHINGTON STEEL & BOLT COMPANY, a Corporation,

Bankrupt.

**Assignment of Errors [of Washington Trust Co.].**

COMES NOW the Washington Trust Company, a corporation, by its attorney, the undersigned, and in connection with its petition on appeal herein from the final orders, and decrees entered in the above-entitled action on October 16, 1914, and from all other orders in said proceeding affecting the substantial rights of the said Washington Trust Company, and as assignments of error upon which it will rely upon the

prosecution of its appeal, says that in said record and proceeding there is manifest error in this, to wit:

I.

The District Court of the United States for the Western District of Washington, Northern Division, erred in holding that the bonds amounting to \$22,900.00 held by the Bank of Montreal and taken by it as security for the payment of the loan made to the Washington Steel & Bolt Company, at the time of the making of said loan, void, and in refusing to hold each of said bonds valid and secured by the trust deed given for that purpose. The said Court further erred in refusing to adopt Paragraph IV of the provisions for decree proposed by the Washington Trust Company.

II.

The said Court erred in holding that the bonds of the Washington Steel & Bolt Company afterwards taken by the Bank of Montreal, amounting to the par value of \$25,000.00, were void, and in refusing to hold the same valid and in refusing to adopt [127] as part of its decree or order Paragraph VI of the proposed provisions of the Washington Trust Company.

III.

The said Court erred in holding \$1,500.00 par value of the bonds of the Washington Steel & Bolt Company held by C. F. Chapin, void and of no effect, and in failing and refusing to hold the said bonds valid and in failing and refusing to adopt Paragraph X of the provisions for decree proposed by the Washington Trust Company.



## IV.

The said Court erred in holding in effect that the bonds of the Washington Steel & Bolt Company held by Thomas F. Burley were null and void, and in failing and refusing to hold the said bonds amounting to the par value of \$2,600.00 valid, and in failing and refusing to adopt and incorporate in its decree Paragraph XII proposed by the Washington Trust Company as an appropriate part of the order of said Court.

## V.

The said Court erred in ordering and directing a sale of the property of the Washington Steel & Bolt Company, and in refusing the bond holders of the said company the right or privilege to use in bidding for said property their bonds in proportion to the net amount of the proceeds of said sale which would ultimately be turned back to any bond holder as a bidder at said sale, and in failing and refusing to adopt Paragraph XXI of the provisions for decree proposed by the Washington Trust Company.

## VI.

The said Court erred in refusing to grant the Washington Trust Company leave to foreclose its mortgage according to the prayer of its petition, and in refusing to require the trustee in bankruptcy, after the mortgage was held valid, to elect whether he would administer upon the equity of redemption of the property covered by said mortgage for the benefit of general creditors, or [128] surrender the property for mortgage foreclosure.

## VII.

The said Court erred in the order entered October 16, 1914, in directing that there should be deducted from the proceeds of the sale such proportion of the expenses and costs as should be paid by the interests represented by the Washington Trust Company.

## VIII.

The said Court erred in refusing to sustain the exceptions of the Washington Trust Company to the order entered by the Referee on the 28th day of July, 1914, and erred in confirming said order.

## IX.

The said Court erred in holding in its final order certain of the bonds invalid and void, which it pronounced valid in its memorandum opinion.

## X.

The said Court erred in refusing to specifically or at all, sustain Exception No. 1 of the Washington Trust Company to the Referee's Report and Findings.

## XI.

The said Court erred in refusing to specifically, or at all, sustain Exception No. 2 of the Washington Trust Company to the Referee's Report and Findings.

## XII.

The said Court erred in refusing to specifically, or at all, sustain Exception No. 3 of the Washington Trust Company to the Referee's Report and Findings.

## XIII.

The said Court erred in refusing to specifically, or



at all, sustain Exception No. 4 of the Washington Trust Company to the Referee's Report and Findings.

#### XIV.

The said Court erred in refusing to specifically, or at all, sustain Exception No. 5 of the Washington Trust Company to the Referee's Report and Findings. [129]

#### XV.

The said Court erred in refusing to specifically, or at all, sustain Exception No. 6 of the Washington Trust Company to the Referee's Report and Findings.

#### XVI.

The said Court erred in refusing to specifically, or at all, sustain Exception No. 7 of the Washington Trust Company to the Referee's Report and Findings.

#### XVII.

The said Court erred in refusing to specifically, or at all, sustain Exception No. 8 of the Washington Trust Company to the Referee's Report and Findings.

#### XVIII.

The said Court erred in refusing to specifically, or at all, sustain Exception No. 9 of the Washington Trust Company to the Referee's Report and Findings.

#### XIX.

The said Court erred in refusing to specifically, or at all, sustain Exception No. 10 of the Washing-

ton Trust Company to the Referee's Report and Findings.

XX.

The said Court erred in refusing to specifically, or at all, sustain Exception No. 11 of the Washington Trust Company to the Referee's Report and Findings.

XXI.

The said Court erred in refusing to specifically, or at all, sustain Exception No. 12 of the Washington Trust Company to the Referee's Report of Findings.

XXII.

The said Court erred in refusing to specifically, or at all, sustain Exception No. 13 of the Washington Trust Company to the Referee's Report and Findings. [130]

XXIII.

The said Court erred in refusing to specifically, or at all, sustain exception No. 14 of the Washington Trust Company to the Referee's report and Findings.

XXIV.

The said Court erred in refusing to specifically, or at all, sustain exception No. 15 of the Washington Trust Company to the Referee's report and Findings.

XXV.

The said Court erred in refusing to specifically, or at all, sustain exception No. 16 of the Washington Trust Company to the Referee's report and Findings.



## XXVI.

The said Court erred in refusing to specifically, or at all, sustain exception No. 17 of the Washington Trust Company to the Referee's report and Findings.

## XXVII.

The said Court erred in refusing to specifically, or at all, sustain exception No. 18 of the Washington Trust Company to the Referee's report and Findings.

## XXVIII.

The said Court erred in refusing to specifically, or at all, sustain exception No. 19 of the Washington Trust Company to the Referee's report and Findings.

## XXIX.

The said Court erred in refusing to specifically, or at all, sustain exception No. 20 of the Washington Trust Company to the Referee's report and Findings.

## XXX.

The said Court erred in refusing to specifically, or at all, sustain exception No. 21 of the Washington Trust Company to the Referee's report and Findings. [131]

## XXXI.

The said Court erred in refusing to specifically, or at all, sustain exception No. 22 of the Washington Trust Company to the Referee's report and Findings.

## XXXII.

The said Court erred in failing and refusing to

specifically or at all sustain the first ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

XXXIII.

The said Court erred in failing and refusing to specifically or at all sustain the second ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

XXXIV.

The Court erred in failing and refusing to specifically or at all sustain the third ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

XXXV.

The Court erred in failing and refusing to specifically or at all sustain the fourth ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

XXXVI.

The said Court erred in failing and refusing to specifically or at all sustain the fifth ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

XXXVII.

The said Court erred in failing and refusing to specifically or at all sustain the sixth ground of error assigned by the Washington Trust Company in its



Petition for Review, upon [132] which the District Court passed in rendering its said decision.

XXXVIII.

The said Court erred in failing and refusing to specifically or at all sustain the seventh ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

XXXIX.

The said Court erred in failing and refusing to specifically or at all sustain the eighth ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

XL.

The said Court erred in failing and refusing to specifically or at all sustain the ninth ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

XLI.

The said Court erred in failing and refusing to specifically or at all sustain the tenth ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

XLII.

The said Court erred in failing and refusing to specifically or at all sustain the eleventh ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

## XLIII.

The said Court erred in failing and refusing to specifically or at all sustain the twelfth ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision. [133]

## XLIV.

The said Court erred in failing and refusing to specifically or at all sustain the thirteenth ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

## XLV.

The said Court erred in failing and refusing to specifically or at all sustain the fourteenth ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

## XLVI.

The said Court erred in failing and refusing to specifically or at all sustain the fifteenth ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

## XLVII.

The said Court erred in failing and refusing to specifically or at all sustain the sixteenth ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

## XLVIII.

The said Court erred in failing and refusing to



specifically or at all sustain the seventeenth ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

XLIX.

The said Court erred in failing and refusing to specifically or at all sustain the eighteenth ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision. [134]

L.

The said Court erred in failing and refusing to specifically or at all sustain the nineteenth ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

LI.

The said Court erred in failing and refusing to specifically or at all sustain the twentieth ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

LII.

The said Court erred in failing and refusing to specifically or at all sustain the twenty-first ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

LIII.

The said Court erred in failing and refusing to specifically or at all sustain the twenty-second ground of error assigned by the Washington Trust Company

in its Petition for Review, upon which the District Court passed in rendering its said decision.

LIV.

The said Court erred in failing and refusing to specifically or at all sustain the twenty-third ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

LV.

The said Court erred in failing and refusing to specifically or at all sustain the twenty-fourth ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

LVI.

The said Court erred in failing and refusing to specifically [135] or at all sustain the twenty-fifth ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

LVII.

The said Court erred in failing and refusing to specifically or at all sustain the twenty-sixth ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

LVIII.

The said Court erred in failing and refusing to specifically or at all sustain the twenty-seventh ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.



## LIX.

The said Court erred in failing and refusing to specifically or at all sustain the twenty-eighth ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

## LX.

The said Court erred in failing and refusing to specifically or at all sustain the twenty-ninth ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

## LXI.

The said Court erred in failing and refusing to specifically or at all sustain the thirtieth ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

## LXII.

The said Court erred in failing and refusing to specifically or at all sustain the thirty-first ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision. [136]

## LXIII.

The said Court erred in failing and refusing to specifically or at all sustain the thirty-second ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

## LXIV.

The said Court erred in refusing to incorporate in

its said order and decree upon review Paragraph I of the provisions requested by the Washington Trust Company to be incorporated in the order or decree of the court.

LXV.

The said Court erred in refusing to incorporate in its said order and decree upon review Paragraph II of the provisions requested by the Washington Trust Company to be incorporated in the order or decree of the court.

LXVI.

The said Court erred in refusing to adopt Paragraph III of said provisions.

LXVII.

The said Court erred in refusing to adopt Paragraph V of said provisions.

LXVIII.

The said court erred in refusing to adopt Paragraph VII of said provisions.

LXIX.

The said court erred in refusing to adopt Paragraph VIII of said provisions.

LXX.

The said court erred in refusing to adopt Paragraph XIII of said provisions.

LXXI.

The said court erred in refusing to adopt Paragraph XIV of said provisions. [137]

LXXII.

The said court erred in refusing to adopt Paragraph XVI of said provisions.



## LXXIII.

The said court erred in refusing to adopt Paragraph XVIII of said provisions.

## LXXIV.

The said court erred in refusing to adopt Paragraph XIX of said provisions.

## LXXV.

The said court erred in directing a sale of the said lands and premises before the validity of the said bonds was finally passed upon and determined, and in failing to suspend the sale until the prosecution of an appeal might be had from its judgment.

## LXXVI.

The said court erred in confirming the order entered July 28, 1914, permitting and directing the sale of the property of said bankrupt.

## LXXVII.

The said court erred in confirming in part the Report, Findings, Conclusions and Judgment of the Referee entered July 20, 1914.

WHEREFORE, The Washington Trust Company prays that the decrees and orders of the United States District Court for the Western District of Washington, Northern Division, appealed from herein, be reversed and said cause be remanded with instructions to the District Court to sustain the exceptions of appellant to the Report, Findings, Conclusions and Judgment of the Referee entered July 20, 1914, and sustain its exceptions to the order directing the sale of said property, entered by said referee on [138] July 28, 1914, and that each and every bond issue by the said Washington Steel & Bolt Company and

proved in this action, as shown by the record, be adjudged and decreed valid, existing obligations of the Washington Steel & Bolt Company, and secured by the mortgage or trust deed referred to and described in the record herein, and that the trustee be required to elect whether he will administer upon the equity of redemption of the said order, or surrender the same for foreclosure, and if a sale of said property is directed or ordered to be made by the Trustee in Bankruptcy, and bond holder holding valid bonds to be adjudged and decreed the right to use the bonds in bidding at said sale, and that the Washington Trust Company, the appellant herein be permitted to use the said bonds with the consent of the holders thereof, in answering any bid which it might make for the use and benefit of said bond holders, and that the said proceedings and said orders and decrees be corrected and made to conform to the facts as produced at the trial and the law as may be announced by this Court, and that it have any other and further relief that this Court may deem meet and equitable and consistent with the record herein.

JAMES B. MURPHY,

Attorney for Washington Trust Company.

Due service of the within Assignment of Error acknowledged and a true copy received this 26th day of October, 1914.

J. W. RUSSELL,

Attorney for Trustee in Bankruptcy.

[Endorsed]: Assignment of Error. Filed in the United States District Court, Western District of Washington. Oct. 26, 1914. Frank L. Crosby, Clerk. By B. E. S., Deputy. [139]



*In the District Court of the United States for the  
Western District of Washington, Northern Division.*

No. 4717.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY, a Corporation,  
Bankrupt.

**Bond [on Appeal of Washington Trust Co.].**

KNOW ALL MEN BY THESE PRESENTS,  
that the Washington Trust Company, a corporation,  
as principal, and AMERICAN SURETY COM-  
PANY OF NEW YORK, a corporation as surety,  
acknowledge themselves to be jointly and severally  
held and firmly bound unto the above-entitled Wash-  
ington Steel & Bolt Company and Edward H. Cha-  
velle, its Trustee in Bankruptcy, in the full, just sum  
of \$————, lawful money of the United States,  
for the payment of which, well and truly to be made  
the said principal and the said surety bind them-  
selves, their successors and assigns jointly and sever-  
ally, firmly by these presents.

DATED this 24th day of October, 1914.

The condition of the foregoing obligation is such  
that whereas the above-entitled court, in the above-  
entitled cause, entered and rendered on the 16th day  
of October, 1914, a final judgment and order in favor  
of the contention of the said trustee and against the  
contention of the Washington Trust Company, the  
principal herein, holding certain bonds of the Wash-  
ington Steel & Bolt Company void, and refusing to  
hold certain bonds issued by the Washington Steel  
& Bolt Company valid, and confirming in part the

Findings, Conclusions and Judgment of the referee entered July 20, 1914, and also on said date entered an order confirming an order of the referee entered July 28, 1914, permitting and directing a sale of the lands and premises of said Washington Steel & Bolt Company free of encumbrances, and whereas the above-named principal, feeling itself [140] aggrieved by the said judgments and various orders entered in said cause prior to said judgments, has taken appeal from said final orders and decrees and said orders to the United States Circuit Court of Appeals for the Ninth Circuit, and whereas the Court has allowed said appeal and fixed a bond in the sum of \$1000.00.

NOW, THEREFORE, to protect the said appeal and in compliance with the order allowing the same, this obligation is given and if the said principal and appellant shall prosecute its said appeal to effect, and answer all damages and costs, if it shall fail to make good its appeal, then the above obligation shall be void, otherwise to remain in full force and virtue.

WASHINGTON TRUST COMPANY,

[Seal]

By JAMES B. MURPHY,

Its Attorney.

AMERICAN SURETY COMPANY OF  
NEW YORK,

By EDWARD LYONS,

Its Resident Vice President.

ATTEST:

A. E. KRULL,

Its Resident Assistant Secretary.



The foregoing bond is hereby approved as to the amount and sufficiency of the sureties.

JEREMIAH NETERER,

Judge.

Due service of the within Bond acknowledged and a true copy received this 26th day of Oct. 1914.

J. W. RUSSELL,

Attorney for Trustee in *Bankrupt*.

[Endorsed]: Bond. Filed in the United States District Court, Western District of Washington. Oct. 26, 1914. Frank L. Crosby, Clerk. By B. E. S., Deputy. [141]

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[**Petition of Washington Trust Co. for Revision,  
etc. ]**

*In the District Court of the United States in and for  
the Western District of Washington, Northern  
Division.*

No. 4717.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY, a Corporation,

Bankrupt.

PETITION FOR SUPERVISION & REVISION.  
To the Honorable Judges of the Circuit Court of Appeals of the Ninth District:

Your petitioner, the Washington Trust Company, feeling itself aggrieved by the orders, judgments and proceedings hereinafter referred to and described, hereby petitions the Court to superintend and revise the said orders and judgments, and in that connec-

tion and to that end your petitioner respectfully shows as follows:

I.

That it resides at Spokane in Spokane County, State of Washington and in the above-entitled district, and is a creditor of the Washington Steel & Bolt Company, a corporation, the above-entitled bankrupt, who was adjudged a bankrupt by the District Court of the United States for the Western District of Washington, Northern Division on the 18 day of September, 1911.

II.

That after such adjudication the following proceedings were had in the case of the said bankrupt, which have resulted prejudicial, as your petitioner verily believes, to the legal rights and remedies of your petitioner;

a. That heretofore, to wit: during the month of May, 1912, Edward H. Chavelle, as trustee of the estate of the above-entitled bankrupt, filed a petition before the Honorable John P. Hoyt, the Referee, to which the above-entitled matter had been duly and [142] regularly referred by the said District Court, wherein the said trustee sought to have all the property of the said bankrupt sold for cash, free and clear of encumbrances.

b. That a notice and citation was issued to your petitioner to appear, and show cause why the said property should not be sold.

c. That in answer to said notice your petitioner, on the third day of June, 1912, filed an Answer thereto, which Answer contained also a cross-peti-



tion setting forth the facts that on September 1, 1908, the said bankrupt, the Washington Steel & Bolt Company, while it was engaged in the transaction of its own business and four months prior to the decree or order adjudging it a bankrupt, made, executed and delivered to your petitioner a trust deed, securing bonds to be issued in the sum of Two Hundred Thousand Dollars (\$200,000.00), which deed covered all the property of the Washington Steel & Bolt Company and was recorded in Volume 69 of Mortgages, at page 388, Record of Mortgages of Snohomish County, Washington, that being the county in which the property of the said Washington Steel & Bolt Company was situated, and that the said mortgage was duly filed as a chattel mortgage, and that the bonds to the amount of \$53,100.00 had been negotiated by the said Washington Steel & Bolt Company, and were outstanding, and that in compliance with the provisions of said mortgage the holders of said bonds requested your petitioner to foreclose the mortgage and take such steps as might be necessary to protect their interests in the premises, and prayed that the petition of the said trustee in bankruptcy be denied and that it, your petitioner herein, be granted an order authorizing and empowering it to foreclose this mortgage upon the real and personal property belonging to said bankrupt, and that the cross-petition of the Washington Trust Company was amended to fix the date of the execution of the said mortgage as the 9th day of September to correspond with the date of the acknowledgment appearing thereon. [143]

d. This answer and cross-petition was afterwards, to wit: On August 14, 1912, supplemented by another petition, substantially in the form of the former petition, asking leave to foreclose said mortgage, to which answer and cross-petition and petition the Trustee in Bankruptcy answered, denying certain allegations therein and alleging that no bonds were regularly issued by the said Washington Steel & Bolt Company, as provided in said trust deed, and that all the bonds issued by the Washington Steel & Bolt Company in connection with said deed and trust were fraudulent and void, and prayed that the prayer of your petitioner be denied to which affirmative matter a reply was filed by your petitioner denying the affirmative matter in said answer.

e. That evidence was taken upon the issues so joined, and on the 26th day of November, 1912, the referee rendered a memorandum of decision granting the Washington Trust Company leave to foreclose its mortgage upon paying into bankrupt court the sum of Twelve Hundred Dollars (\$1200.00) to defray the expenses incident to the care of the property and certain charges for the Referee and Trustee in Bankruptcy, and on the 19th day of November, 1912, entered a formal order granting your petitioner leave to foreclose upon the payment of said sum.

f. That your petitioner, feeling itself aggrieved by the said decision and order, had the correctness of said order reviewed by the District Court, and that thereafter, on the third day of March, 1913, the said District Court reversed the ruling of the said referee and referred the case back for the further



taking of testimony upon all questions relative to the scope and validity of the mortgage and the bonds secured thereby and directed that when such questions had been determined the trustee must elect whether he would administer the equity of redemption in the property for the benefit of general creditors provided said mortgage and bonds are held valid, or surrender the mortgaged property to the mortgagee for foreclosure. From this order there was no appeal and [144] the cause was sent back for taking of testimony pursuant thereto. After taking the testimony on May 15, 1913, the Honorable John P. Hoyt, referee, rendered a memorandum decision holding that the said trust deed was void, and on June 16, 1913, following entered a formal order denying the petition of your petitioner to foreclose upon the ground and for the reason that the said mortgage and bond were null and void.

g. Your petitioner, feeling itself aggrieved by said decision, had the correctness thereof reviewed by the judge of the District Court, who, on the —— day of September, 1913, filed a memorandum decision holding the trust deed valid but referred the cause back to the referee for the taking of further testimony upon the amount due and owing upon the bonds and under date of November 14, 1913, entered a formal order by said judge of the District Court, referring the case back pursuant to the tenor of said opinion. Further testimony was taken. Thereafter, on the 20th day of July, 1914, the referee made his Findings of Fact and Conclusions of Law, and on the same day entered an order wherein and whereby

it was ordered that the prayer of the petition of your petitioner to foreclose said mortgage be denied, and that the claim of the Washington Trust Company be rejected and disallowed and expunged from the list of claims upon record in this case, and the said Referee in Bankruptcy, on July 28, 1914, entered an order upon the petition of the Trustee in Bankruptcy to sell said property authorizing and directing him to sell all the property of the said bankrupt, which property was covered by said mortgage, for cash, free and clear of claims of the said mortgage and the said bonds. Each of said orders was taken to the district judge upon a petition for review. The Honorable Jeremiah Neterer, as district judge, on the 15th day of September, 1914, rendered a memorandum opinion, in which he held bonds amounting to \$37,000.00 valid and \$25,000.00 invalid, and that the said bonds were secured [145] by the trust deed which was valid, but afterwards modified his decision holding \$10,000 of said bonds valid and the remaining bonds void and confirmed the order of the referee directing that the property be sold for cash by the said trustee, and denying the holders of the bonds, which were declared valid, the right to use their bonds in any manner in bidding at said sale. Exceptions were duly taken to the ruling of the said district judge and certain findings or orders were presented by your petitioner for signing, signing of which was refused by the said judge, and this petition is to review the correctness of the ruling of the said judge upon said matters.

A copy of the order directing a sale of the prop-



erty free and clear of encumbrances is hereto attached and marked Exhibit "A."

A copy of the memorandum opinion rendered by the said judge is hereto attached and marked Exhibit "B."

A copy of the order pronouncing the invalidity of said bonds is hereto attached and marked Exhibit "C."

A copy of the exceptions made thereto by your petitioner is hereto attached and marked Exhibit "D."

A copy of the decree or order proposed by your petitioner and refused by the said judge, together with his notation as to the exception thereto, is hereto attached and marked Exhibit "E."

A copy of the order of the said honorable judge confirming the order of the Referee for the sale of said property is hereto attached and marked Exhibit "G."

### III.

That the ruling of the said Honorable Jeremiah Neterer was erroneous in law and in fact in the following particulars: [146]

a. Said order was erroneous in that it did not adjudge each bond held by the Bank of Montreal valid, and in that it omitted to include in the valid bonds of the Washington Steel & Bolt Company the bonds held by the Bank of Montreal.

b. Said order was erroneous in that it held \$1500.00 of the par value of the bonds held by C. F. Chapin void.

c. Said order was erroneous in that it did not ad-

judge that all the bonds held by Thomas S. Burley were valid and in omitting from the bonds held valid the bonds held by Thomas S. Burley.

d. The action of the said judge was erroneous in that it did not require the said trustee in bankruptcy to administer upon the equity of redemption in said property for the benefit of general creditors, or to surrender the property for foreclosure.

e. The said judge erred in refusing to incorporate in his order and judgment Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18a and 18b of the order or decree proposed by your petitioner, and each of them.

f. That the said Court erred in affirming the order of the referee directing a sale of the said lands and premises for cash.

g. The said order was erroneous in that it provided that a certain portion of the proceeds of the sale of the said property should be applied to the payment of the expenses of the bankruptcy proceedings before the application of any of said funds to the payment of said bonds.

#### IV.

That the amount involved in the above controversy exceeds the sum of \$2,000.00, and that the par value of said bonds, exclusive of interest, amounts to approximately \$45,000.00. [147]

WHEREFORE, your petitioner, feeling aggrieved because of such orders, and each of them, asks that the same may be reviewed in matters of law by your honorable Court, as provided in Section 24-B of the



Bankruptcy Law of 1898 and the rules and practice in such case provided.

WASHINGTON TRUST COMPANY.

By JAMES B. MURPHY,

Its Attorney.

JAMES B. MURPHY,

Attorney for Petitioner. [148]

State of Washington,

County of King,—ss.

I, JAMES B. MURPHY, being first duly sworn upon oath, deposes and says: That he is the attorney for the petitioner above named, the Washington Trust Company; that the Washington Trust Company has no officer or agent within the County of King, State of Washington, or nearer than Spokane, and that affiant is the agent and attorney of the said Washington Trust Company for the purposes of all litigation in the above-entitled matter and the prosecution of this petition for review, and that the statement of facts contained in the foregoing petition for review are true according to the best of my knowledge, information and belief.

JAMES B. MURPHY.

Subscribed and sworn to before me this 26 day of October, 1914.

[Seal]

ISRAEL NELSON,

Notary Public in and for the State of Washington,

Residing at Seattle, County and State aforesaid.

Due service of Petition for Revision acknowl-

edged and a true copy received this 26th day of Oct. 1914.

J. W. RUSSELL,  
Attorney for Trustee in Bankruptcy.

[Endorsed]: Petition for Supervision and Revision. Filed in the United States District Court, Western District of Washington. Oct. 26, 1914. Frank L. Crosby, Clerk. By B. E. S., Deputy.  
[149]

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**[Order Extending Time to November 2, 1914, to File  
Praeipie for Record, etc.]**

*In the District Court of the United States for the  
Western District of Washington, Northern Division.*

No. 4717.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY, a Corporation,  
Bankrupt.

Upon the application of the Washington Trust Company and good cause appearing therefor, the time to file a praecipe for the record on appeal herein, together with a narrative statement of the evidence to be embodied in the record on appeal, is hereby extended to the 2d day of November, 1914.

Dated this 26th day of October, 1914.

JEREMIAH NETERER,  
District Judge.

O. K. J. W. RUSSELL,  
Attorney for Trustee in Bankruptcy.



[Endorsed]: Filed in the United States District Court, Western District of Washington. Oct. 26, 1914. Frank L. Crosby Clerk. By B. E. S., Deputy. [150]

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**[Order Extending Time to November 5, 1914, to File  
Praeipe for Record, etc.]**

*In the District Court of the United States for the  
Western District of Washington, Northern Division.*

No. 4717.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY, a Corporation,

Bankrupt.

Upon the application of the Washington Trust Company and good cause appearing therefor, the time to file a praecipe for the record on appeal herein, together with a narrative statement of the evidence to me embodied in the record on appeal, is hereby extended to the 5th day of November, 1914.

Dated this 2d day of November, 1914.

JEREMIAH NETERER,  
District Judge.

O. K. Russell.

[Endorsed]: Extension of Time for Filing Prae-  
cipe and Narrative Statement of Evidence. Filed in  
the United States District Court, Western District  
of Washington. Nov. 2, 1914. Frank L. Crosby,  
Clerk. By B. E. S., Deputy. [151]

**[Order Extending Time to November 10, 1914, to  
File Praecept for Record, etc.]**

*In the District Court of the United States in and for  
the Western District of Washington, Northern  
Division.*

No. 4717.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY, a Corporation,  
Bankrupt.

Upon the application of the Washington Trust  
Company and good cause appearing therefor, the  
time to file a praecipe for the record on appeal  
herein, together with a narrative statement of the  
evidence to be embodied in the record on appeal, is  
hereby extended to the 10th day of November, 1914.

Dated this 5th day of November, 1914.

JEREMIAH NETERER,  
Judge.

O. K. Russell.

[Endorsed]: Order Extending Time to File Prae-  
cipe. Filed in the United States District Court,  
Western District of Washington. Nov. 5, 1914.  
Frank L. Crosby, Clerk. By B. E. S., Deputy.  
[152]



**[Order Extending Time to November 16, 1914, to  
File Praecept for Record, etc.].**

*In the District Court of the United States for the  
Western District of Washington, Northern Division.*

No. 4717.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY, a Corporation,  
Bankrupt.

Upon the application of the Washington Trust Company and good cause appearing therefor, the time to file a praecipe for the record on appeal herein, together with a narrative statement of the evidence to be embodied in the record on appeal, is hereby extended to the 16th day of November, 1914.

Dated this 10th day of November, 1914.

JEREMIAH, NETERER,  
District Judge.

O. K. Russell.

[Endorsed]: Order Extending Time. Filed in the United States District Court, Western District of Wahington. Nov. 10, 1914. Frank L. Crosby, Clerk. By B. E. S., Deputy. [153]

**[Order Extending Time to November 23, 1914, to  
File Praeipe for Record, etc.].**

*In the District Court of the United States for the  
Western District of Washington, Northern Divi-  
sion.*

No. 4717.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY, a Corporation,

Bankrupt.

Upon the application of the Washington Trust Company and good cause appearing therefor, the time to file a praecipe for the record on appeal herein, together with a narrative statement of the evidence to be embodied in the record on appeal, is hereby extended to the 23d day of November, 1914.

Dated this 14th day of November, 1914.

JEREMIAH, NETERER,

District Judge.

O. K. Russell.

[Endorsed]: Order. Filed in the United States District Court, Western District of Washington. Nov. 16, 1914. Frank L. Crosby, Clerk. By B. E. S., Deputy. [154]



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**[Depositions Taken Before Referee.]**

*In the District Court of the United States in and for  
the Western District of Washington, Northern  
Division.*

No. 4717.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY, a Corporation,

Bankrupt.

NARRATIVE STATEMENT OF THE TESTI-  
MONY FOR EMBODIMENT IN THE REC-  
ORD OF APPEAL IN THE ABOVE-EN-  
TITLED CAUSE.

Hearing before Hon. JNO. P. HOYT, Referee in  
Bankruptcy, April 3, 1914, in Seattle, Washington.

**Deposition of Thomas S. Burley.**

(Witness on behalf of Washington Trust Com-  
pany.)

My name is Thomas S. Burley. I reside in Se-  
attle. I am the owner of \$2600 par value of the  
bonds of the Washington Steel & Bolt Company.  
Interest has been paid upon the bonds I hold to  
September 1, 1911. My bonds are numbered 443,  
444, 445, 498, 499, 500, 701 and 717, which bonds are  
received in evidence and marked exhibits 40 to 47  
respectively; the unpaid detached coupons accom-  
panying the bonds marked Exhibit 48. I acquired  
these bonds in the fall of 1908. I think it was when  
they first came out. I got them in a trade from A.  
McPhaden and paid a valuable consideration. I  
bot them under a contract with A. McPhaden. I



(Deposition of Thomas S. Burley.)

fulfilled all the terms and conditions of that contract. This contract bears date about September 14, 1908. This contract contained a provision that Mr. McPhaden would buy them back at 90¢ on the dollar, but he refused to do it. (Contract produced, received in evidence and marked Exhibit 49.) The signature on these bonds, as officers of the Washington Steel & Bolt Company, are the signatures of Mr. Pike and Mr. McPhaden.

Cross-examination.

Q. I see that this contract (referring to contract between [156] Burley and McPhaden) Mr. Burley, calls for three one thousand dollar bonds?

A. They did, sir.

Q. While, as a matter of fact, the bonds you have produced here are two \$1000 bonds and six \$100 bonds? A. Yes, sir.

Q. Where does that discrepancy of four hundred dollars come?

A. I will explain that. These bonds were put in escrow until I finished that wagon, filed away, and then when I finished what I agreed to do I went and demanded them. In March, I think it was, about the 1st of March, I went to get the money for the bonds, or the bonds, either one, and they had not been given up, and he said he couldn't pay me any money. So there was a party that I gave four hundred dollars to, and he gave me the hundred dollar bonds for the thousand.

I could not say whether those bonds were the bonds of McPhaden at that time, or whether they

(Deposition of Thomas S. Burley.)

were issued direct by the Washington Steel & Bolt Company. They were put in the safe for safe keeping by the bank there, by Mr. Webster, I think. They were certified by the trust company. I do not know whether McPhaden took the bonds with him when we made this contract. They were put in trust, but whether by McPhaden or the company I don't know. I expect he had authority from the company to do anything he had to do. I supposed they were the company's bonds. I did not know whether they were McPhaden's bonds or what they were, as far as that goes. The stock of the Co-operative Industrial Securities Company,—756,900 shares—I was interested in that company, making wagons and rotary axle. The par value of these shares was \$1.00. This stock had been selling for 10¢ a share and then some higher, going up all the time. I could not say whether this company is still alive. I think it is. I would not say for sure. I have not been in Spokane for some time. The forty [157] acres at Kennewick I got a deed for. The deed was signed by McPhaden I think. I sold the property soon afterwards. McPhaden valued the land at \$2000 taking out \$216.00. There was no money paid in the transaction at all. He gave me a \$500 note, which was paid. That \$500 went to a party interested in that axle with me. The stock in the co-operative Industrial Securities Company was sold on the 14th day of September, 1908, in the market at 15¢ per share. I took these bonds of the Washington Steel & Bolt Company at \$3000. Did



(Deposition of Thomas S. Burley.)

not quote any particular price. McPhaden and I had no understanding as to what they were put in the deal at. There was no understanding whether they were being put in at 100 cents on the dollar, 90 cents on the dollar, or 95 cents on the dollar, but the contract provided that if I wanted to dispose of them on or before March 1st, following, he would take them back from me at 90 cents on the dollar. I cut the detached coupons off and sent them in for a payment of interest, but they were not paid. I knew McPhaden about a year before this transaction with him. I first bought some stock in the Washington Steel & Bolt Company thru him. The spring before I made this contract I bot 751 shares which I still have. I have forgotten the figures on the value of equipping the two vehicles with the Van Luren axle. I think they cost me somewheres about \$100.

Redirect Examination.

My contract was with McPhaden personally. He didn't sign it for the Washington Steel & Bolt Company. [157½]

**Deposition of A. McPhaden, April 14, 1914.**

(Witness on behalf of Washington Trust Company.)

My name is A. McPhaden. I was connected with the Washington Steel & Bolt Company in the capacity of President from 1906 to sometime about December, 1909.

Q. Mr. McPhaden, I hand you certain bonds, which are marked petitioners' exhibits by Dora

(Deposition of A. McPhaden.)

Beach, a Notary Public who took depositions 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, and ask you to examine these bonds and see if they bear the signature of yourself as President and the signature of Mr. Pike as Secretary of the Washington Steel & Bolt Company.

Mr. RUSSELL.—It is not necessary to go through those bonds. There is no question, I think, but what Mr. McPhaden and Mr. Pike signed these bonds.

Mr. MURPHY.—Well, if that is true, I will not prove the signatures, counsel admitting that the signatures are the signatures of the officers and also the seal of the company.

The COURT.—That is satisfactory.

Testimony continued:

While I was President of the company I had the selling of the bonds. While I was President of the company I first saw the Bank of Montreal in Spokane concerning the borrowing of money for the company along in March or April of 1909. We were short of money and I went to the bank to see if I could not negotiate a loan. The Manager of the Bank wanted to know the conditions of the company. The bonds outstanding, etc. I explained to him the number of bonds that were out and by whom owned.

[158]

He said it could make no loan unless it could have those bonds put up as security, a portion of them. I told him the bonds I had, and also that Mr. Pike had some. He wanted to know if I could put up these bonds as collateral security and he said he would go



(Deposition of A. McPhaden.)

down and see the plant. We agreed to that so he did come down and saw the plant. That same day he agreed to advance us \$20,000 on a loan. That was before the Washington Steel & Bolt Company received any money. I agreed to put up all the bonds that I had at that time, \$20,000, but I did not have them on hand. I had loans on them which I advanced to the company again. I could not get them at that time until I released them. After I did get them I did put them up there at different times with the Bank. When I put them up it was pursuant to the agreement I had with the Bank. The Bank also required Mr. Pike and myself to sign individual notes as security for the same loan. I was not an officer of the company at a later date when \$24,000 or \$25,000 additional bonds were put up with the Bank of Montreal as additional security for this loan. I was a stockholder at that time. I was not on the Board of Trustees at that time. There was an overdraft at that time and unpaid interest and the Bank wanted this additional security. I am not certain just the date I severed my connections with the company, but it was during December, 1909, or February, 1910. The Bank of Montreal did actually advance and loan to the Washington Steel & Bolt Company, pursuant to said agreement, the sum of \$20,000.

Cross-examination.

The first \$10,000 of the \$20,000 was got, I think, in May of 1909. I don't know as I put up any bonds at that time. We got \$5,000 a couple of months afterwards. I don't remember that I put up any bonds

(Deposition of A. McPhaden.)

at that time. Shortly afterwards we got \$2,500 more. I could not say whether I put up any bonds at that time. Later, I should judge about six months after, we got the balance of it. [159] I don't remember whether I put any bonds up when the last note was made. I could not say whether I had put up any bonds to the time that I got the last note negotiated. They had the bonds in their possession at that time. They had them there. There was from time to time I put up bonds. I had them out on loans. When I got them I turned the money in. As soon as I got the money I took them up and put them back in the Bank against this loan. I could not say whether I had put any of them there against this loan prior to the time that I negotiated the last one of these notes. The bonds put up with the Bank were my individual bonds. I bought them of the Washington Steel & Bolt Company, and paid for them in cash at the rate of 90¢ on the dollar. I did not pay the cash at the time I got the bonds. I advanced the Washington Steel & Bolt Company money prior to the getting of the bonds. I did not get all the bonds at one time. The record book of the Washington Steel & Bolt Company will show these advances. I could not say what book as I am no bookkeeper. But I saw the amounts set down in the cash book or journal and there was a ledger. I do not know enough about bookkeeping to know just what books that account should be in. I kept no personal account of my advances to the company but sent the money down to the office and they kept track of it down there. I



(Deposition of A. McPhaden.)

kept tab at that time, but all those papers were destroyed when I closed my office in Spokane three years ago—four years ago. I advanced this money in all kinds of sums, small sums and large sums, just as I got it. I borrowed much of the money that I advanced to the company, some from the directors of the company, some from my own brothers, and some from stockholders. Some of the money I advanced to the company was derived from the sale of stock of the Washington Steel & Bolt Company but not all of it. I sold some of my own personal stock and put the money in there but the greater portion of it was borrowed money. I borrowed some from ———. He was an officer and stockholder of the Washington Steel & Bolt [160] Company. I borrowed as high as \$1800 to \$2,000 from this party that I loaned the company. I borrowed some more money from Mrs. Siewert of Spokane. She was a stockholder in the company. I borrowed \$1500 or \$2,000 from her all at one time. This was in 1908 or 1909. I also borrowed money from C. F. Chapin of Coeur d'Alene, Idaho. I borrowed up as high as \$2,500 once. I paid him in bonds of the Washington Steel & Bolt Company. I bot the bonds from the company, borrowed the money from him, gave it to the company. Then when I paid him off, I sold him the bonds. Before the bonds were issued I think I loaned the company \$27,000 all told, something like that. I am not exactly sure. There were no bonds sold outside of what I sold except \$2,900 par value that went to Mr. Pike. Aside from the \$2,900 par value bonds

(Deposition of A. McPhaden.)

that went to Mr. Pike all the balance of the bonds were delivered to me. I paid for them all except the \$25,000 in bonds that were later given to the Bank of Montreal. The balance I paid 90 cents on the dollar to the Washington Steel & Bolt Co. The bonds outstanding of the Washington Steel & Bolt Company are \$2,900 par value issued to Mr. Pike, \$34,200 issued to me and \$25,000 later issued direct by the Washington Steel & Bolt Company to the Bank of Montreal; that I think is correct, I won't be \$100 out. I bot the bonds I received from the Washington Trust Company by paying them 90¢ on the dollar from time to time, and sold the bonds, turned the money back again, etc., kept them going in that way and sometimes I loaned individual stock, and gave some of my own personal stock as inducements to sell bonds. I took no salary. There was 1906, 1907, 1908, 1909, four years, that I did not receive one cent of salary with the exception, I think, of \$75.00, which was 5% of the treasury sales for two or three months. I have forgotten which it was. Otherwise I did not get any salary.

The total capitalization of the stock was \$2,000,000. I got \$1,400,000 in stock from the Washington Steel & Bolt Company when [160½] I turned over to the company a patent of the Cline rail joint. I had two partners in this patent, Mr. Cline of Detroit, Michigan, and J. H. McKelvey of British Columbia; bot them out; paid one man \$1500, I think, and a block of stock and the other man got cash, something like \$1500. I bought his third interest outright for



(Deposition of A. McPhaden.)

\$1500 without any stock, as I remember it. We each originally had a one-third interest. The block of stock I gave in the above purchase was 25,000 or 50,000 shares of the Washington Steel & Bolt Company. It was my stock, a part of the \$1,400,000. I do not know the actual value of the patent that was turned over to the Washington Steel Bolt Company. At that time it was to be demonstrated. I do not think it was ever demonstrated. I got the bonds for 90¢ on the dollar in this way,—first \$75,000 were to be sold as mentioned in the mortgage deed of trust. They were to be sold at 95¢ on the dollar, and the Washington Steel & Bolt Company passed a resolution that there be allowed 5% commission for selling. That would net 90¢.

Q. How much money did you advance the Washington Steel & Bolt Company all told for which you took bonds?

A. Well, I will tell you. There was \$37,100. Subtract \$2,900 and take ten per cent off, and the balance was cash.

Q. And the books of the Washington Steel & Bolt Company will show that?

A. Show every dollar of it; yes, sir.

#### Redirect Examination.

Bonds numbered 409, 654 and 653 were shown witness and he identified the signatures and the seal of the company and the certificate of the Washington Trust Company through Mr. Webster. I paid for these bonds, provided they do not belong to the \$25,000 that was issued to the Bank as additional security.

(Deposition of A. McPhaden.)

Q. You mean Mr. Pike's or these. These are bonds held by Osborne of Chicago?

A. I could not swear these are the ones. [161]

(Bonds were offered in evidence.)

Mr. RUSSELL.—I object as incompetent and immaterial. It is not sufficiently designating the bonds or identifying them. I object to their being received in evidence as not properly proven.

(The bonds were received in evidence and marked Exhibits Nos. 50 to 52, inclusive.)

Mrs. Meta McElroy was Meta Seiwert and is the person of whom I borrowed the money. She paid me for the bonds in cash. (Exhibits 7 and 8 being two checks signed by Meta Seiwert, now Meta McElroy, were received in evidence.) I know Mr. Chapin of Coeur d'Alene. I had borrowed money from him, which I sent to the Washington Steel & Bolt Company. The Washington Steel & Bolt Company was paid in cash for these bonds by me and all the money paid the company for these bonds was used by the company. All the bonds of the Washington Steel & Bolt Company, which I received were received from the Washington Trust Company pursuant to resolution of the Board of Trustees of the Washington Steel & Bolt Company. I had to deliver to the trust company the resolution or a copy of the minutes before they would deliver to me the bonds. Concerning the taking of bonds at 90¢ on the dollar, the company agreed to allow for the sale of these bonds 5% on par. This was passed by resolution of the Board of Trustees. I have not the minute book showing the



(Deposition of A. McPhaden.)

minutes of the company. It was left with the company when I severed my connection with them. I spent the most of my time in Spokane. I advanced to the company \$37,100, less \$2,900, and less 10%, and received bonds therefor. That was all I advanced for bonds. [162]

A. McPHADEN (Recalled).

A. McPhaden was recalled for further cross-examination, and testified as follows:

I have not the minute book of the Washington Steel & Bolt Company. I never saw it in the courtroom at the trial in Spokane. It was not offered in evidence as I know of. I never saw it. There was a corporation book at Spokane in the courtroom held by a man back in the audience who was one of their witnesses. It appeared to be about the size and shape of the minute book of the Washington Steel & Bolt Company, but whether it was or not, or what it was, I do not know. That is all I saw of it. I do not know that it was the minute book of the Washington Steel & Bolt Company.

Redirect Examination.

With reference to the \$9,000 of bonds delivered to me by The Washington Trust Company upon my notes I was in the country and in order to make things come around quick and save time I thought it better to take these bonds with me, and in order to do so I wrote the company here to try to pass a resolution allowing the Washington Trust Company to take my notes so I could get these bonds, with the understanding that if I did not make a deal I was to return

(Deposition of A. McPhaden.)

the bonds back, and receive the notes back, which was done. I did not make the deal, and turned the bonds back, and the resolution was passed authorizing them to deliver me those notes. The bonds were returned to the Washington Trust Company, and they delivered me the notes. The \$9,000 in bonds delivered to me on authority of the Washington Steel & Bolt Company, and which was returned to The Washington Trust Company by me, was not included in the bonds which I mentioned as being issued and negotiated. I never did have access to the bonds held by The Washington Trust Company except when a resolution was passed by the Washington Steel & Bolt Company and the minutes delivered to The Washington Trust Company. [163] The money which I paid for the bonds of the Washington Steel & Bolt Company, which were negotiated, was always paid in advance of getting the bonds.

Recross-examination.

Q. You state these bonds were issued to you in payment of money that you had theretofore advanced to the Washington Steel & Bolt Company. Now, was that money that you had been depositing in the Bank to their credit, or was it money that you expended for them?

A. No, I forwarded them the money in ninety-nine cases out of a hundred. I very often put the money in the Bank up there, or sent it down here.

Q. How long afterwards before you would get the bonds?

A. Well, maybe it would accumulate first before



(Deposition of A. McPhaden.)

the bonds were issued, and I had quite a large sum in there credited that way, and I would have up to \$5,000 or \$4,000. When it got to certain amounts, if I saw a sale for bonds I bought the bonds and sold the bonds, and turned in more.

Q. It was only as you had opportunity to sell bonds then that you had them issued?

A. Usually. When I saw a chance to sell them, I called for them.

Q. Isn't it a fact that whenever you wanted any of those bonds you would direct a meeting of the Board of Directors to be held, and a resolution passed?

A. That was usually the case.

I was at the time President and Trustee of the corporation. I did not meet with the trustees. I was usually in Spokane. Mr. Ammon, the Vice-president, took my place. He was a trustee also.

Q. You simply wrote over that you wanted such and such a resolution passed, and they would pass it.

A. It was up to them if they thought it was for the best, and [164] they usually found it was for the best. They had a right to object if necessary. I was not the whole thing. I was only one out of five trustees.

I do not think we ever had seven trustees on the Board that I remember of, but there was a time when we changed the name of the Washington Steel & Bolt Company, and I think at that time there was a meeting of the stockholders to allow seven if necessary at one time. We could have three or seven. I do not remember of ever seven acting on the Board. I think

(Deposition of A. McPhaden.)

it was five. I have no arrangements with the Bank of Montreal concerning this property when it is sold.

[165]

**Deposition of T. T. Barbour April 14, 1914.**

(Witness on behalf of The Washington Trust Company.)

My name is T. T. Barbour. I reside at Edmonds, Washington; have resided there for six years. My business is ranching at the present time. I was bookkeeper of the Washington Steel & Bolt Company from the first of April, 1910, until it went into bankruptcy in September, 1911. As bookkeeper I had charge of the books of account of the company, and had charge of the office at the time the trustee was appointed and took possession. At that time all the books of account were in the office except one. That was the minute book. The ledgers were there, the cash books were there, the journals were there, the day books were there, and they were all turned over to the Trustee in Bankruptcy in this case.

(Mr. Barbour was here handed the book marked "Journal" on the back, and on the side of the book marked "Cash Book.")

I recognize this book as one of the books kept by the Washington Steel & Bolt Company as a cash book. I used it more as a bank book than I did a cash book. The journal is practically a cash [166] book. It shows the receipts in cash of the Washington Steel & Bolt Company from all sources. On page 189 of this book is an entry showing a deposit by the company in the Bank on May 1, 1909, of \$10,000. On page



(Deposition of T. T. Barbour.)

52 of the journal it shows that the Bank of Montreal advanced on May 1, 1909, to the Washington Steel & Bolt Company the sum of \$10,000. On page 58 of the journal is an entry showing the receipt from the Bank of Montreal of \$5,000. This \$5,000 was deposited to the credit of the Washington Steel & Bolt Company. On page 70 of the journal under date of June 16th is an entry showing the receipt from the Bank of Montreal of the sum of \$2,500, which was deposited to the credit of the Washington Steel & Bolt Company. On page 84 of the journal and page 202 of the Bank deposit book it shows a receipt under date of July 28th from the Bank of Montreal of \$2,500, and the same was on the same day deposited to the credit of the Washington Steel & Bolt Company. The same transaction shows a note given of \$2,500 and a credit of that amount of cash. These four entries total \$20,000. The books of the Washington Steel & Bolt Company show that all this money was deposited by the Bank of Montreal to the credit of the Washington Steel & Bolt Company. The books of the Washington Steel & Bolt Company also show that all this money so deposited was used by it.

These are not the only books that were in the office at the time I turned it over to the Trustee in Bankruptcy. There was a set of books ahead of this one, the old set of books, and then the ledgers and the note books. I was acquainted with the account of Mr. McPhaden, in the new ledger which is a continuation of the old account. Mr. McPhaden's account, as it ap-

(Deposition of T. T. Barbour.)

peared on the books of the Washington Steel & Bolt Company, always showed that McPhaden had a credit for money paid into the company. McPhaden had advanced money to the company from time to time, as shown by the books.

**T. T. Barbour (Recalled) on May 27, 1914.**

(On behalf of Trustee in Bankruptcy.) [167]

I know about the value of the Washington Steel & Bolt Company plant up there. The land without the buildings is worth about \$30,000. The Buildings cost \$9000; put up six years ago; and aside from broken windows are in good condition. The tools and machinery cost \$32,000 and are worth from sixty to seventy-five per cent of cost. The machinery and tools are deteriorating in value. [168]

Hearing before JOHN P. HOYT, Referee in Bankruptcy, April 25, 1913 in Seattle, Wn.

Petitioner's Exhibit No. 2, certified copy of the mortgage deed of trust was received in evidence.

Mr. MURPHY.—(Statement of the Court.) We also served notice to produce the books of the company upon the trustee. That is the notice. (Counsel handed referee paper.) I will ask the Trustee to produce the minute book.

Mr. RUSSELL.—The notice to produce, if the court please, is to produce everything in the hands of the trustee. It would take a van to bring those things up here. If they had specified certain things within reason, that we could bring them here, we would have brought them if we had had them.



(Deposition of T. T. Barbour.)

Mr. MURPHY.—I think I specified the minute book.

The COURT.—All books of account, minute books and stock and bond books in your possession and belonging to the company.

Mr. MURPHY.—I specifically specified the minute book and that is the book I am now asking for.

Mr. CHAVELLE.—That book is not in our possession and never was.

Mr. MURPHY.—You have a copy of it.

Mr. CHAVELLE.—No.

Mr. MURPHY.—You never did have a copy?

Mr. CHAVELLE.—The book was stolen, your Honor, and never returned.

Mr. MURPHY.—As I understand, there was a copy made of the minute book, and they have it.

The REFEREE.—He says now he is only asking for the minute book, and not having the original, he inquires about the copy.

Mr. CHAVELLE.—If your Honor please, I understand there is no copy of the minute book. I have myself looked unsuccessfully for the book. The original book was stolen long before this bankruptcy proceeding. We have never been able to recover it.

[169]

**Deposition of Mr. Pike, April 14, 1914.**

(Witness on behalf of Washington Trust Company.)

My name is A. G. Pike.

I reside at Seattle.

I was treasurer of the Washington Steel & Bolt

(Deposition of A. G. Pike.)

Company almost continuously and secretary off and on until about the six months prior to the time that the company went into bankruptcy. At the time the company went into bankruptcy I was still supposed to be working for it. I was at that time located at Edmonds where the plant was situated, and had charge of the property of the company. I was the operating medium of the plant. I was a director of the company until within six months of the bankruptcy proceedings. A copy of the minute-book was in the office of the company at the time a trustee in bankruptcy was appointed. The original minute-book was purloined away sometime before by one of its former secretaries, Mr. Kelly, and has not been recovered since. (The witness was shown Exhibit No. 33 purporting to be a copy of the minutes of the Trustees' Meeting held June 29, 1909, and asked if that was a correct copy of the record of that meeting as shown by the minute-books.) I cannot say that I remember positively this wording of this meeting, but there was one meeting that was called at the request of Mr. McPhaden and the trustees.

Q. Was it your habit to send a copy of resolutions or the action of the board of trustees to The Washington Trust Company of all matters pertaining to the issuing of bonds under the trustee in question?

A. We usually called the Board together to act on those propositions.

If I remember right one time was all that the board was called together when there was a call for bonds. We would send copies of the minutes of the



(Deposition of A. G. Pike.)

meeting to the Washington Trust Company. I [170] was supposed to keep them supplied with copies of the minutes of what meetings were held. I did not send them a copy or a paper purporting to be a copy of any minutes that was false. All the copies purporting to be actions of the Board of Trustees sent to the Washington Trust Company from the office were correct copies. Mr. Beason was secretary at one time.

I am handed Petitioner's Exhibit No. 37 filed by Dora Beach while taking deposition, and I think that is a correct copy of the minutes of a meeting of the Washington Steel & Bolt Company. I was present at that meeting.

I am handed Petitioner's Exhibit No. 38 filed by said Dora Beach, and I know there was an action taken at the Board of Directors' meeting regarding this \$25,000 additional security. Just the details, the way this was written up, I do not remember, the details of how they were wrote up. I know there was a deal like that passed through. The Board of Trustees were authorized to deliver \$25,000 additional bonds to the Bank of Montreal. It was about April 16, 1911. Whatever the action of the Board was, it was carried out, at that time.

#### Cross-examination.

I think the Washington Steel & Bolt Company first started with five trustees and then it was increased to seven. I do not remember when the increase took place. I believe there were seven in March of 1911. It may have been seven in the be-

(Deposition of A. G. Pike.)

ginning and five later. I do not know which way it was, whether it was seven in the first place and two taken off or whether it was five and two added on. I could not tell you about that. I think Mr. Hall was one of them that was added and Yost, I think. I am not sure about that. There were seven I think at that time if I remember right, and they, Mr. Yost and Dr. Hall, were added. I think there were seven directors when Dr. Hall was on. I think I stated to you right in the first place; that is, that there were seven [171] and then reduced to five. Petitioner's Exhibit No. 37 shows three here. As I say, if there were seven on our directorate at that time there was only three present. If we had five we had a majority. I cannot recall; it is so long back. I know that we had five at one time and then seven, as I said before, I do not know which. It seems to me that Mr. Hall was one of those added but the minutes will show. I think Mr. Ammon and Mr. Hall were both there. Mr. Hall had a call over the 'phone, an obstetric case, and had to leave quick. This was taken up to his house that night for him to sign. He was a doctor. I know that Mr. Hall did not sign it before he left the office, but I could not say whether the resolution was passed before he left or not, but I know I took it up to his house. Maybe Mr. Barbour took it up to Dr. Hall for signing. Mr. McPhaden represented to me that most of the money turned into the company toward the wind-up of it was for the sale of stock that had been issued to him direct. There was very little treasury stock



(Deposition of A. G. Pike.)

that was ever sold. McPhaden turned over to the company the rail joint patent for the 1,400,000 shares of stock issued to him. We never made any demonstration of the patent and nobody ever did to my knowledge. The company never manufactured any of the rail joints covered by the patent.

Referring to Exhibit No. 37, I do not know whether George Olson prepared this or not. He prepared some of them for us. I believe he did that. I think there were regular notices issued for that meeting.

#### Redirect Examination.

In reference to the minutes of the meetings, I endeavored to act honestly and squarely. I think there was some preparations by attorneys to give us a plan by which to adopt certain things. We worked under advices of attorneys to do certain things at times, but I do not remember that this was one of those times. It [172] might have been but I do not remember that it was. The details of these things I do not remember. It has been so long that I cannot remember the details of these things like I probably should.

Referring to Exhibit No. 37, we did have a meeting this day, to the best of my memory. I think Mr. Hall seconded that motion. I stated that Mr. Hall was called out before the minutes were reduced to writing. The minutes were ordinarily written up after the meeting was held. Sometimes they were just jotted down and written up later. After they were written up, they were sent around to have the

(Deposition of A. G. Pike.)

signatures of the trustees. We always tried to have the signatures of all trustees upon all minutes. I do not remember that I recorded facts in the minutes that did not exist.

Q. Did you endeavor at all times as secretary of that company to incorporate in the minutes just what happened at the meetings?

A. That was what we had our meetings for.

Witness recalled.

Recross-examination.

The last year the plant run it made, I think, about twelve to thirteen thousand dollars. [173]

**Deposition of A. G. Pike, May 21, 1914.**

(Witness on behalf of the Trustee in Bankruptcy.)

(Witness is shown Trustee's Exhibit "G" consisting of two sheets.)

That is McPhaden's handwriting. I thought the other sheet was there until my attention was called to it. It must be at home. (This and other letters, Exhibits "A," "B," "C," "D," "E," "F" and "G" admitted in evidence.)

Cross-examination.

I suppose Mr. McPhaden has the letters I wrote in answer to the letters filed in evidence. I kept no copy.

Witness Recalled by Trustee.

The books of the company do not show any bonds issued. There is no bond account kept at the office. The trustee kept the bond account is my recollection. There were two \$100 bonds sold for cash and the



(Deposition of A. G. Pike.)

money turned into the company, and that is all that were sold for cash. The rest of them were taken in accounts for the company. I do not know to whom those two bonds were sold.

Cross-examination.

I knew that Mr. McPhaden was giving some of his time to the selling of these bonds.

McPhaden always had a credit on the books for money paid in when he took the bonds out. [174]

Redirect Examination.

I know what patent the bonds claimed to be owned by J. H. Osborne were given in payment of. It was a water regulator for feeding a boiler automatically. The company never tried to get any value out of it. They never tried to make it or sell it. It was not tested out, simply got the right and did nothing with it.

Recross-examination.

The bonds which were given to Osborne in payment of his patent did not come out of the treasury of the company. They came from McPhaden's bonds. It is not a fact that Osborne sold the company this patent for so much money, or that the company complained of the patent and McPhaden compromised with Osborne by giving the company the patent and paying Osborne in his own stock. He gave Osborne his own bonds, the bonds that had been issued to him.

A. G. PIKE (recalled) on May 27, 1914.

(On behalf of Trustee in Bankruptcy.)

The land up there, exclusive of buildings, is worth

(Deposition of A. G. Pike.)

from \$33,000 to \$35,000. The buildings are worth \$9,000. The tools and machinery are worth some thirty to thirty-five thousand dollars. No machine does any good standing still. The plant would bring a better price if sold now than in the future. [175]

**Deposition of H. E. Watson on April 27, 1914.**

(Witness on behalf of Trustee in Bankruptcy.)

I have resided in Seattle about four years, engaged in the real estate business. I first became connected with the Washington Steel & Bolt Company about three years ago. In the first place I was simply trading stock with McPhaden and Pike. That was the way I got started in it. Then I made another trade with McPhaden. I acquired more or less stock. There was a time when I became president of the Washington Steel & Bolt Company and one of the Board of Directors. There was a meeting held after we were elected, but everything that was done was done at the suggestion of Mr. McPhaden; the affairs of the company were conducted for the benefit of McPhaden. Whatever he wanted done he notified the Board of Directors and they did it. There was never a meeting that I know of after that time. In other words, the affairs of the Washington Steel & Bolt Company were being conducted for the benefit of A. McPhaden. I cannot remember the day I became President and Director. Approximately, it was about three years ago as I remember. There were no dividends declared while I was connected with the company. I was told there was a dividend just before that.



(Deposition of H. E. Watson.)

I have had several conversations with Pike and A. C. Gunn, and McPhaden, after this proceeding in bankruptcy relative to the affairs of the Washington Steel & Bolt Company. They were figuring on organizing a new company. McPhaden told me that the Bank of Montreal was simply working under his instructions. I do not know when the first conversation with Pike, Gunn and McPhaden was had. I never saw the minute-book of the Washington Steel & Bolt Company. I did see a copy of it in my office in the Arcade Building. I had it about a week and turned it over to Gunn and McPhaden. McPhaden [176] came and got the book. He lives on the Snake River. He got the place, 320 acres, from me. He took the title in his brother's name. He told me he took the title that way so his creditors couldn't get it. That place is worth \$35,000. The Bank of Montreal holds about \$8,000, of my paper—my company paper. The notes were to McPhaden and I paid them to him, taking his receipt therefor. He put them in the Bank of Montreal. The bank still holds them and refuses to turn them over.

I have known McPhaden for seven years. He was then living in Spokane. I was living in Spokane. I was acquainted with the speech of people generally speaking in Spokane to a certain extent. I learned what his reputation was for truth and veracity. It was bad. Judging from the speech of people I do not deem it advisable to credit him as a witness. From the speech of people I would not believe him.

(Deposition of H. E. Watson.)

Cross-examination.

Q. Then when he gave you some wild stories about the Bank of Montreal doing just what he wanted them to do, you did not believe them?

A. I did at the time until I found him out.

Q. You don't believe it now, do you?      A. No.

There must be something wrong or the bank would not be holding my notes. I gave McPhaden \$15,000 in the first place. \$7,000 I got back. The others the bank has. I paid the others, the \$8,000 to McPhaden about the time they became due, before they were due, I think. I have letters written by him acknowledging the payment of the notes and acknowledging that the bank has no right to hold them. They were paid in the land deal. I took another piece of [177] land he had in the Big Bend country, and turned him this ranch for the notes and was to get some money. I never got the money or these notes. He owes me in the neighborhood of \$3,500 on that deal. Besides this he owes me in the neighborhood of seven or eight hundred dollars, making a total of about \$4,200. I do not sue him or go after this land simply because I am like the rest of us. I do not see how I can and I cannot fight him.

I became president of the Washington Steel & Bolt Company some time in May of 1911, and continued to be president until the trustee in bankruptcy was appointed. I was living at that time in Seattle. I never lived at Edmonds. I do not know what the trustees who lived up there might have done. I continued president until the bankruptcy proceedings.



(Deposition of H. E. Watson.)

I do not know who preceded me as president. I was not a trustee of the company before I became president. Until I became president of the company I, had nothing to do with the actions taken by the Board of Trustees from time to time. McPhaden told me that he was trying to reorganize the Washington Steel & Bolt Company. He told me that he and Gunn were trying to reorganize the company and that they borrowed some money from McPhaden's brother to pay off the indebtedness against the plant. One of the things he was going to pay was a \$375 check that he gave me. One day I asked him why he didn't pay that, told him, "You have got the money from your brother, you know I need the money." He said, "If you need money, you go get it. I get all the money I want, and there isn't a son-of-a-bitch of a stockholder who will get it."

Redirect Examination.

Q. What became of the old board of trustees at that time? A. They all dropped out.

Q. At whose suggestion, McPhaden's, and a new board elected by McPhaden? [178] A. Yes.

At the time Gunn and McPhaden first took up the question of a reorganization of the Washington Steel & Bolt Company, they talked to me as tho they were going to reorganize it among the people who were in on it. Afterwards, it was different altogether. They were going to organize it themselves and leave the stockholders out. That was the time that he told me that not a son-of-a-bitch of a stockholder would ever get a cent out of it. [179]

**Deposition of W. R. Ammon on May 21, 1914.**

(Witness on behalf of Trustee in Bankruptcy.)

I have resided at Edmonds for about five years. I was at one time connected with the Washington Steel & Bolt Company as Vice-President. Mr. McPhaden and Mr. Pike were in control of its affairs. In the main, Mr. McPhaden would dictate any correspondence to Mr. Pike, what he wanted done. The resolutions were brought to me as they wanted them passed. Sometimes we had a meeting and sometimes not. They would bring them to me wherever they caught me about Edmonds. In some cases I would sign them, and some not. I own something around 36,000 shares of stock. I purchased them from Mr. Pike. Part of the consideration was services. I paid no monetary consideration. I became a director about six months after I went to Edmonds, five years ago. I was director of the Washington Steel & Bolt Company down to the bankruptcy proceedings.

I am in the electric business at Edmonds, selling power and light. My electric light plant joins the property of the Washington Steel & Bolt Company. The land of the Washington Steel & Bolt Company is worth between \$30,000 and \$40,000 and the buildings are worth about \$6,000. I identify the signature of letters marked for identification Exhibits "A," "B," "C," "D," "E" and "F" as that of Mr. McPhaden, once the president of the Washington Steel & Bolt Company. I do not recall that I ever saw the letters before. I know the handwriting.



(Deposition of W. R. Ammon.)

Regarding any meetings of the Board of Directors at the company's office, or anywhere else, as a body in which any action was taken relative to the issuance of bonds of the company, I could not be positive as to that. There was early in the game, when I first went there, there was either a meeting called to ratify the issuance of bonds or float a bond issue. [180]

The bonds referred to at that meeting of the Board of Trustees were part of them issued to McPhaden and part to Pike. I do not just remember. The bonds issued to McPhaden were issued to him in payment of moneys that he claimed to have advanced to the company, as I understood it, and those are the bonds I have in mind. I do not remember at what price McPhaden took the bonds. I do not recall any other meeting of the Board of Directors where they got together where any resolution for a bond issue was adopted, passed or presented. The resolution I signed at the office of the company on one occasion was one gotten out by Mr. Olson purporting to be a meeting of the directors authorizing them to issue bonds for \$25,000 payable to the Bank of Montreal, or someone like that, as near as I can remember. I was called by telephone to come to the bolt works, and sign a resolution. After getting there I read the resolution and said to the secretary, Mr. Barbour, "Is there any danger of getting in any trouble by signing this?" And he said that it was not worth the paper it was written on. I signed it. Barbour was not a director. Pike was not pres-

(Deposition of W. R. Ammon.)

ent. I was the only director present. Dr. Hall came in afterwards and as I remember asked about the same question that I did. Dr. Hall signed it. At that time he and I were the only directors present. (Petitioner's Exhibit 37 shown witness.) Such a resolution as that, or a resolution of which that is a copy, was never passed by the Board of Directors sitting as a Board of Directors.

There was supposed to be five directors at that time, three of us dead ones. I have no recollection of the number of the directors being changed. Mr. Pike usually brought the resolutions to me for signing.

#### Cross-examination.

The Washington Steel & Bolt Company was the first time I [181] ever held office in a corporation. I did not take an oath as Vice-President or as trustee—I was not asked to. I do not remember the date when I was made director. I attended a stockholders' meeting each year.

I do not remember attending any other meetings. Whenever they called me I went.

I do not remember attending any meetings except the stockholders' meetings. I never signed any statement pertaining to the Washington Steel & Bolt Company that was false. Every statement that I signed was a truthful statement, so far as I know. I did not say that I remember having signed certain papers brought to me by Mr. Pike. I said that this particular resolution was handed to me by Mr. Barbour to sign. I do not remember of any other resolutions having been handed to me for



(Deposition of W. R. Ammon.)

signing. To tell the truth, I remember very little about it. I told you why I remembered that. I was very explicit in that line. I never at any time signed any statement purporting to be a resolution, which was false, to trick the Bank of Montreal or anyone else. Whatever I did was in good faith absolutely. I took the word of the others. I said that sometimes I signed resolutions and papers that were passed to me and sometimes not. Well, whenever it was legitimate, what I thought was right. I exercised my own judgment so far as they would give me to understand the motive of the business, what they were doing. I never signed anything blindly, not [182] knowing about it. As a matter of fact, I do not remember very much about what I did as an officer of the company. Just routine business; that is all.

#### Redirect Examination.

I ascertained whether the statements that I signed were true or false through Mr. Pike. He would say that they wanted to do so and so, and were going to get this money here and that money there, and wanted a resolution to that effect or McPhaden would write over his instructions for him to carry out. I took for granted that what they said was true. I did not examine the books.

#### Recross-examination.

I depended upon Mr. Pike for the statement of fact in reference to finances. He was the treasurer and secretary and manager, but so far as declarations of fact concerning myself are concerned, I made no

(Deposition of W. R. Ammon.)

false statement. I never signed one, not that I know of. I never made a false statement as to what I did or did not do. [183]

**Deposition of A. M. Yost on May 21, 1914.**

(Witness on behalf of Trustee in Bankruptcy.)

I live at Edmonds and have resided there for twenty-four years. I used to be in the mill business. I am not doing anything at present. I have retired. I do not know whether I was connected with the Washington Steel & Bolt Company or not. I bought a few shares of stock, \$1000 or something like that from Mr. Pike, and the first thing I knew after that they called me a trustee. I attended one meeting and immediately resigned. I stayed there and listened to the doings just what it was, and then resigned right after that. That disgusted me. That meeting was in the fall of 1908, as near as I can remember. I do not recollect that there were any resolutions passed at that meeting for the issuance of bonds. I never signed any resolutions to my knowledge, authorizing the issuance of bonds. Mr. McPhaden seemed to me that he was the whole thing and the only thing. I got disgusted at once because I did not want anything to do with a one-sided arrangement. That is what caused my resignation at once.

I do not know that I ever was a director. I attended one meeting and resigned right away. I didn't know I was a director until the day before it was called. I got a notice of the meeting from Mr.



(Deposition of A. M. Yost.)

Pike. I was never sworn in as a director to my knowledge.

I am connected with the Spring Water Company furnishing water to the city of Edmonds. I do not know as I ever knew Mr. McPhaden until the day they appointed me and introduced me to him. That was the first time I saw him to my recollection. In fact, it was the last time I guess. I have heard discussions among the people at Edmonds as to the reputation for truth and veracity of Mr. McPhaden, talks on the streets. I know the opinion of people in and around Edmonds touching his truth and veracity. From the speech [184] of people around Edmonds his reputation for truth and veracity is bad. Based upon that reputation I would not deem him entitled to credit as a witness.

#### Cross-examination.

I never saw McPhaden but once; do not know whether he was in Edmonds very much or not. Edmonds has a population of 1000 or 1200 people. I knew Mr. Pike was the man in charge of the Washington Steel & Bolt Company. I knew Mr. McPhaden lived and operated in Spokane during that time. It is generally a fact that when a person promotes an enterprise of any kind and for any reason that enterprise becomes a failure or passes into the hands of a receiver, leaving debts, it always casts an odium upon the person promoting it, no matter how sincere he may be, and I presume whatever bad reputation Mr. McPhaden may have in Edmonds

(Deposition of A. M. Yost.)

is due very largely to the fact that his enterprise there was a failure and did not pay its debts. [185]

**Deposition of Dr. H. W. Hall, May 21, 1914.**

(Witness on behalf of Trustee in Bankruptcy.)

I have resided at Edmonds for ten years last passed. Have been during said time a physician and surgeon in practice there. There was a time when I was connected with the Washington Steel & Bolt Company. I could not state, with reference to the books of the company, when that connection began. I think I was director about two years. I do not know. I resigned I think just before the bankruptcy proceedings. My impression is—but now it might have been—I don't think it was over three years—I think it was about two years.

I own somewhere between one and two hundred shares of stock of the Washington Steel & Bolt Company. I acquired it from Mr. Pike. I paid cash for it. I do not know how long after I acquired the stock I was elected trustee, I think a few months after. That is my impression. Of course, I cannot give anything exact because it was a long time ago and I did not keep any notes on it. I think I was elected at one of the annual meetings but it seems to me that I was on the Board of Trustees before that, but of course, this whole matter is rather hazy. I never took an oath of office as trustee in that concern and I never saw anybody else take an oath as trustee, no oaths administered. During the time I was trustee some of the resolutions were



(Deposition of Dr. H. W. Hall.)

passed at the office, and some of them were written up and brought around to us to sign purporting to be a meeting. I could not say how many meetings of the Board of Directors I attended while I was director. I know there were several.

Q. Do you recall the signing of a resolution providing for the issuing of \$25,000 of bonds to the Bank of Montreal as collateral for a loan that the bank was carrying? [186]

A. I remember I signed something for some bonds, but I do not remember much about it.

It seems to me there were two batches of bonds issued. That is my recollection but I won't be sure about it, and my impression is that I signed them both. I could not say whether I signed them at the office or at home. I know I had some meetings at the office and some were brought to me. I think the first resolution for bonds we signed was at the full board meeting. A part of the time the board consisted of five and a part of the time I think it was seven members. I mean I think it was three and five members. Isn't that right? I know after a time the number was reduced so that it would make three of us in town, a majority of the board. The three were Mr. Pike, Mr. Ammon and myself. I heard the testimony of Mr. Ammon concerning the signing of the resolution of the Board of Directors touching the issuing of \$25,000 in bonds. I recall going to a meeting, but now I could not say what meeting it was. I remember coming in from the country from Lake Ballinger and going down late

(Deposition of Dr. H. W. Hall.)

to a meeting when Mr. Ammon and Mr. Barbour, I think, were the only ones there. I think I signed a resolution at that time. I would not swear positively. At the time I signed the other resolution for the issuance of bonds it seems to me there were present Mr. Pike, Mr. Ammon and Mr. McPhaden and Mr. Barbour. That is my impression. Mr. Barbour was not a trustee. He was book-keeper. It seems to me that was the first batch of bonds. I do not remember, I could not say whether those went to Pike and McPhaden or the Bank of Montreal. One meeting took place before the other. I do not know whether it was a month or several months between them, the first meeting when we had a full board there. The first meeting, as I remember, was not at the first part of my term. It might have been rather toward the latter part. I think [187] that the full board was present at the first meeting, and the time Ammon and I were there alone, it is my impression, was the latter meeting. There were times when resolutions were brought to me to be signed purporting to have been the resolutions of the Board of Directors when there was no meeting. They told me it was the same thing if we agreed upon those things that were brought to us; it was the same thing as a meeting; that the effect was the same as if we had a meeting. It was written up for us to sign. During the time I was director it was very evident that Mr. McPhaden was the whole thing. The letters directed what was to be done and I think those directions were usually carried out.



(Deposition of Dr. H. W. Hall.)

Cross-examination.

We, the directors, always acted in good faith, and every letter which came from McPhaden was considered by me as a man; that is, I exercised my judgment in reference to it, and I never knowingly passed a resolution of that company which would operate injuriously to it or to the damage of anyone else and whenever I followed the directions of Mr. McPhaden it was my best judgment that those directions should be carried out. And when these letters of McPhaden were read we discussed them and if he had directed us to do anything which would seem to us injurious to the company we would not have acted or carried them out. Now, referring to the resolutions which were brought to me to sign, and which were signed not in a meeting, I will state that we saw each other almost daily or frequently, and we discussed the matters of the Washington Steel & Bolt Company. I do not think,—I never did sign a resolution but what was talked over more or less and I never signed a resolution upon which our minds had not agreed; that is, agreed that it was the best thing to do. When I came down from Lake Ballinger on that occasion, Mr. Ammon and Mr. Barbour were there. I don't think Mr. Pike was there. Mr. Ammon was Vice-President and I was a trustee at the time. [188]

The other trustee was Mr. Pike and I think there were two in Spokane. I am not sure that I had talked this resolution over previously with Mr. Pike. I do not remember that I did. Of course,

(Deposition of Dr. H. W. Hall.)

this is several years ago and I kept no record of it. I did not, to my knowledge, subscribe to any resolution or any declaration which was a falsehood. I did not intend to surely. It may have been misrepresented to me in that way. That is, some fact or financial condition may have been misrepresented, but as to any act of my own, I never subscribed to a falsehood,—not intentionally. Papers have been handed me to sign purporting to be meetings when there was really no meeting, but we talked it over and agreed upon it and the paper was brought to us to sign. Of course, I would not want to say that we had a meeting although the paper said we had a meeting. It was a lie, you know. I have done that, but as I understood it, it amounted to the same thing. I never intentionally caused to be recorded in the books of the company any resolution or statement for the purpose of deceiving anyone in acting on what appeared there. As I understood it, the resolution in reference to the bonds given to the Bank of Montreal was to put up those bonds with the Bank of Montreal and the Bank of Montreal would give them the money to run the plant. That is my recollection. I did not know very much about the financial condition. Mr. Pike often told me he was going to explain it to me but never got around to it. I do not know the period that my office covered. We talked the matters in reference to the resolutions over sometimes on a street corner and wherever we happened to be, sometimes in Ammon's office.

Q. But not at a meeting of the Board of Directors?



(Deposition of Dr. H. W. Hall.)

A. If we had it talked over at a meeting of the Directors we would vote there and record it. [189]

Resolutions even after a meeting at the office would be written up and sent to us to sign or ratify what we voted at the meeting.

#### Redirect Examination.

As a matter of fact, I made no personal investigation as to the condition of the affairs of the company at the time of signing any of these resolutions further than asking Pike or McPhaden. I did not know what I could have found or where else to go except to them. These various resolutions that I signed, were, I think, nearly always asked for by Mr. McPhaden. [190]

#### Deposition of C. F. Chapin.

Introduced and received in evidence taken at the request of Washington Trust Co. in Spokane, Washington, Feb. 20, 1914.

My name is C. F. Chapin, age 55. I reside at Coeur d'Alene, Idaho. I am the owner of some of the bonds issued by the Washington Steel & Bolt Company. I purchased first three \$500 bonds in the office of the company in Spokane. I cannot state the date exactly. I think the first year they were issued in 1908. My recollection is that I bought them soon after they were issued. I paid 90¢ on the dollar, say \$1500 worth of bonds, I think it was \$1350; anyway it was 90¢ on the dollar. I purchased two \$500 bonds of E. M. Gallant later on, on the second day of April, 1909. I considered that I paid

(Deposition of C. F. Chapin.)

par for these. I bought some other stock with them, 20,000 shares of stock in the Sauve Electric Coil Company, 14,000 of the Washington Steel & Bolt Company and \$1000 worth of bonds of the Washington Steel & Bolt Company. For all of this I paid \$2,500 and received a receipt for the purchase price. (The receipt was received in evidence and marked petitioner's exhibit "1.") I do not recall what price was fixed upon the \$1000 worth of bonds which I purchased under this agreement, but I considered I was paying par value and that they were worth it. I was interested in the company, had a lot of the stock and I certainly thought the bonds were worth par. There was no value to this other stuff that I got in this transaction. There was no market value for any of it really, there was no real market for it, no real sale for it. I have five bonds, in regard to which I have just testified. (Chapin's bonds were received in evidence and marked petitioner's Exhibits 2, 3, 4, 5 and 6.) Exhibits 2, 3 and 4 were the first purchase. [1901½] These bonds were purchased by me in the due course of business. I paid for them by check. I do not think that I saw the deed of trust securing the bonds prior to the time of purchase; that is my recollection, I never saw it.

Q. Had you received any information as to what the deed of trust contained or as to how the bonds were secured?

A. Why, I think I was told they were secured on the property there, that is my recollection.

None of the coupons have been paid which are now



(Deposition of C. F. Chapin.)

a part of the bonds and have not been clipped. At the time I acquired these bonds I had no knowledge or notice that their validity was questioned, or that they were in any way criticized or any objection raised to the legality of them. I purchased and paid for each of them in good faith believing that they were legal and valid. I consented to the Washington Trust Co's. proceeding to foreclose the mortgage or trust deed upon the property of the Washington Steel & Bolt Company.

Cross-examination.

I have been a stockholder in the Washington Steel & Bolt Co. about five years, to the best of my recollection. I was a stockholder before the plant was in operation. I bought stock for the purpose of building the plant, and it was before the date of these bonds. Just what date I cannot say. I was at no time a director nor did I participate in the stockholders' meetings that authorized the making of the trust deed. I never took part in any of the stockholders' meetings. To the best of my recollection, I am very sure I did not. I purchased the first three bonds in the company's office of McPhaden who was the president of the company, and I understood I was buying of the company. At that time I think I owned 10,000 shares of stock of the Washington Steel & Bolt Company. I am a rancher. My business has been mining principally, [191] but I have not done any recently. My business was not dealing in stock and bonds. I invested in the stock of the Washington Steel & Bolt Com-

(Deposition of C. F. Chapin.)

pany as a speculation but as to the bonds as an investment. I got acquainted with McPhaden about the time I bought the first stock. I was one of the first stockholders. [192]

**Deposition of Meta McElroy.**

Received in evidence taken at the request of Washington Trust Co., in Spokane, Wn., on Feb. 20, 1914.

My name is Mrs. Meta McElroy; age 51. I reside in Spokane, Washington, and have lived there sixteen years. I am the owner of some of the bonds of the Washington Steel & Bolt Co. I purchased one bond of \$1,000 and one of \$500 on Sept. 26, 1908. These were purchased from Mr. A. McPhaden and I paid \$1,500, for them by check. (The check was received in evidence and marked Petitioner's Exhibit 7.) I later purchased on June 16, 1909, five \$100 bonds from L. R. Van DeBogart, a former partner of McPhaden. I paid for these bonds \$100 in cash and \$360 in check, making \$460. Those are all the bonds I purchased. At the time of the purchase I had no notice or knowledge that their validity was questioned, or that any question had been raised as to their validity in any way. I am willing to have the foreclosure proceeding for the benefit of myself and other bond holders. At the time I purchased the bonds I understood they were secured by the factory, its output and the property of the Washington Steel & Bolt Company. I understood there was a first mortgage securing them. (The check for \$360 was received in evidence as Petitioner's Exhibit 8. Also bonds Nos. 700 and 706 belonging to Meta Mc-



(Deposition of Meta McElroy.)

Elroy were received in evidence as Petitioner's Exhibits 9 and 10 and bonds numbered 439, 440, 441, 442 and 446 were received in evidence as Petitioner's Exhibits 11, 12, 13, 14 and 15.) I purchased bonds Nos. 700 and 706 first.

**Cross-examination.**

I understood that McPhaden was selling me the bonds for the company. I was a stockholder in the Washington Steel & Bolt Co. at the time I bought these bonds. I never attended any of the [193] meetings of the stockholders, and have never seen the trust deed in question or a copy of it.

**Redirect Examination.**

None of the interest has been paid upon the coupons annexed to the bonds. There have been six semi-annual payments of interest made on each bond. [194]

**Deposition of W. J. Ambrose.**

Received in evidence taken at the request of Washington Trust Co.

In Spokane, Wn., on Feb. 20, 1914.

I am manager of the Spokane Branch of the Bank of Montreal. The Bank of Montreal holds \$47,900 worth of bonds of the Washington Steel & Bolt Company, which are secured by trust deed or mortgage of the Washington Trust Company. These bonds are now in the possession of the Bank of Montreal. The following bonds held by the Bank of Montreal were received in evidence: Nos. 702, 704, 705; 708 to 716 both inclusive; 718 to 732, both inclusive; being 27 bonds of \$1000 each; Nos. 661, 663, 667 to

(Deposition of W. J. Ambrose.)

671, both inclusive, 674 to 690 both inclusive; 695 and 699, 26 bonds of \$500 each; 291 to 300, both inclusive—10 bonds of \$100 each; 665, 666, 672 and 673—4 bonds of \$500 each; 703 and 707—two bonds of \$1000 each, 399 to 407, both inclusive, nine bonds of \$100.00; 691 to 694, both inclusive, four bonds of \$500 each.

(Bonds received in evidence in packages, as Exhibits 16, 17, 18, 19 and 20). We hold these bonds as collateral security for advances made to the Washington Steel & Bolt Company amounting in all to \$20,000 made as follows: On May 1, 1909, \$10,000; on May 11, 1909, \$5,000.00; on June 16, 1909, \$2,500.00 and on July 28, 1909, \$2,500.00. This indebtedness is evidenced by promissory notes executed by A. G. Pike and A. McPhaden in favor of the Washington Steel & Bolt Company and endorsed by it. The money was loaned directly to the Washington Steel & Bolt Company and the transactions were had in the ordinary course of business of the bank. The money was loaned upon the faith of the collateral security or the bonds. The Bank of [195] Montreal requested the Washington Trust Company in writing to foreclose on the mortgage or trust deed securing the bonds. (This written request dated Feb. 19, 1912, was received in evidence as Petitioner's Exhibit 21.) No portion of the principal represented by the notes has been paid. Interest has been paid upon the notes up to December 23, 1910. The endorsements upon the back of each of the notes show this to be so. (The four promissory



(Deposition of W. J. Ambrose.)

notes were received in evidence as Petitioner's Exhibits 22, 23, 24 and 25.) To the best of my knowledge, the bank had no notice of any claim on the part of anyone that the trust deed was invalid at the time the loans were made.

Cross-examination.

I have been manager of the Spokane branch of the Bank of Montreal since July 1, 1912. Prior to that time, I had no connection with this branch. The testimony which I have given relative to the giving of these notes, Exhibits 22 to 25 inclusive, and the turning over to the bank as collateral, of the bonds Exhibits 16 to 20, inclusive, is not from any personal knowledge that I have concerning the matter, but from the records of the bank. At the time these notes were given and these bonds were turned over to the bank, A. H. Buchanan was manager of the bank. He died in October, 1912. Personally, I have no knowledge of the transaction between either the Washington Steel & Bolt Company or McPhaden and Pike at the time of the execution and discount of these four notes, nor have I any knowledge of the transactions which took place between the Bank of Montreal and the Washington Steel & Bolt Company or McPhaden, or Pike, or any of them, at the time these bonds were turned over to the bank, except from the record of the bank. The bank holds other security, collateral to these notes, viz.: eight \$1000 notes of the West Coast Investment Company, all dated June 26, 1911, drawn on demand; also [196] three notes signed by C. O. and S. S. Bassetts—all dated

(Deposition of W. J. Ambrose.)

Dec. 1, 1909, one for \$2,000, payable Oct. 1, 1911; one for \$1,500 payable Apr. 1, 1912; and the other for \$1,750.00 payable Oct. 1, 1912. All these notes were made payable to A. McPhaden and endorsed by him. We also hold 75,049 shares of Alder Creek Mining Company stock—par value \$1.00 each. The Washington Steel & Bolt Company got credit in its account in the bank for the \$20,000.00 proceeds of the four notes. The checking account was closed about 1910, I think. I presume it was balanced.

#### Redirect Examination.

The records of the loans and collateral of the Washington Steel & Bolt Company are the same as of any other loan with collateral. The Bank of Montreal has never realized anything upon any of the other collateral which I have testified it holds. I am informed the West Coast Investment Co. has no assets. We have been unable to collect any money from the Bassetts although we have made several attempts by personal requests and by letter. The mining stock has no present market value. [197]

#### Deposition of R. L. Webster.

Received in evidence taken at request of Washington Trust Company, in Spokane, Wn., on Feb. 20, 1914.

My name is R. L. Webster, age 43; I reside in Spokane, Washington. I am Secretary of the Washington Trust Company, and have been for over ten years. I am acquainted with the transactions between the Washington Steel & Bolt Company and



(Deposition of R. L. Webster.)

the Washington Trust Company. To the best of my knowledge the mortgage deed or trust deed was signed by me as secretary on Sept. 9, 1908. As trustee under the deed of trust the Washington Trust Company certified bonds as follows:

November 16, 1909, Nos. 291 to 295, inclusive, par value \$100 each; February 26, 1910, Nos. 296 to 300, inclusive, par value \$100 each; December 9, 1908, Nos. 399 to 407, inclusive, par value \$100 each; September 17, 1909, Nos. 408 and 446 par value \$100 each; December 18, 1908, Nos. 409 to 438, inclusive, par value \$100 each; September 23, 1908, Nos. 498 to 500, inclusive, par value \$100 each; September 23, 1908, Nos. 564 to 700, inclusive, par value \$500 each; September 23, 1908, Nos. 701 to 750, inclusive, par value \$1000 each; January 8, 1909, Nos. 439 to 445, inclusive, par value \$100 each.

I certified the bonds attaching my signature to the certification blank on the bond as secretary and recorded them in our records. Some of the bonds certified by us were later presented to me to be registered. The Bank of Montreal presented bonds 291 to 300 inclusive, 399 to 407 inclusive; 661 to 663, 665 to 695, both inclusive; 699, 702 to 705, both inclusive; 707 to 716, both inclusive; 718 to 732, both inclusive; 662 and 664. With the exception of Nos. 662 and 664 the bonds of the Bank of Montreal were registered on the 12th day of June, 1911. Numbers 662 and 664 were registered on January 13, 1912. There were also registered in the name of C. F. Chapin on [198] March 1, 1909 bonds Nos. 696 to

(Deposition of R. L. Webster.)

698 inclusive. Bonds Nos. 439, 440, 441, 442, 446, 700 and 706 were registered in the name of Mrs. Meta McElroy, on Feb. 19, 1914. These are all the bonds that were registered. Bonds numbered 301 to 398 both inclusive, 447 to 497, both inclusive, 501 to 563, both inclusive, and Nos. 564 to 652 both inclusive have not been certified. The bonds which I have testified to as having been certified and those which I have testified to as not having been certified constitute the whole bond issue of the Washington Steel & Bolt Company. Bonds Nos. 410 to 438 both inclusive and 655 to 660 both inclusive, are now in our possession and have not been negotiated. R. J. Danson delivered bonds 410 to 438 both inclusive and 655 to 660 both inclusive, to the Washington Trust Company. They belonged, to the best of my knowledge and belief, to J. H. Osborne of Chicago, Illinois.

(Mr. DANSON.—We now offer as part of the evidence of the witness said bonds Nos. 410 to 438 both inclusive and 655 to 660 both inclusive, and ask that they be made a part of the deposition of said witness.)

Mr. RUSSELL.—I object to their being received in evidence on the ground that there is no competent proof to show that these bonds have ever been negotiated by the Washington Steel & Bolt Company.

Upon bonds 408 to 660 both inclusive and on bonds 662 and 664 the interest has been paid to September 1, 1911. I mean that interest due to September



(Deposition of R. L. Webster.)

1, 1911, has been paid on these bonds. No other interest has been paid on any of the outstanding bonds of the company other than what I have just testified to. The Washington Trust Co. was requested in writing by the Bank of Montreal and by J. H. Osborne of Chicago to foreclose on the trust deed. The request of J. H. Osborne was under date of August 29, 1912. (This request of Mr. Osborne was received in evidence and marked petitioner's Exhibit 26.) We have not at present any other bonds in our possession which have been certified by us and negotiated by the Washington [199] Steel & Bolt Company other than those which have been offered in evidence belonging to J. H. Osborne of Chicago.

Cross-examination.

All the bonds of the Washington Steel & Bolt Company were certified by me personally as secretary of the Washington Trust Company. They were not certified to at the same time. As they were certified they were placed in our vaults or delivered by orders from the Washington Steel & Bolt Company. They were given out at different times. The bonds were delivered either by myself or someone authorized by me and were delivered upon the written request of the Washington Steel & Bolt Company, and were delivered as therein requested.

Q. Did you have any means of knowing what consideration, if any, was paid to the Washington Steel & Bolt Company by these various parties to whom you were directed to issue and deliver bonds?

(Deposition of R. L. Webster.)

A. In the case of the bonds delivered to the Bank of Montreal, the minutes of the Directors' meeting showed that these bonds were to be placed in the Bank of Montreal as collateral on a \$20,000 loan. In the case of the bonds sent to A. McPhaden under date of Feb. 26, 1910, we had letters and a statement and the minutes of the Board of Directors of the Washington Steel & Bolt Company setting forth a statement of A. McPhaden's account with the Washington Steel & Bolt Company, which was to be settled by the acceptance of the Washington Steel & Bolt Company by A. McPhaden. Mr. McPhaden's account with the Washington Steel & Bolt Company, according to the statements furnished, was to be settled by bonds at 90¢ on the dollar. The Washington Trust Company made written demand on the Washington Steel & Bolt Company for the payment of the interest on the bonds as provided in the trust deed on September 1, 1911. It was transmitted by telegraph. [200]

Redirect Examination.

We have a number of the records of the minutes of the meetings of the Board of Directors of the Washington Steel & Bolt Company.

Q. Now, I ask you to produce the written request, also the records of the different meetings of the Board of Directors of the Washington Steel & Bolt Company, which were furnished you. (In response to this question these requests and records were introduced and received in evidence as Exhibits Nos. 27 to 39, both inclusive.)



(Deposition of R. L. Webster.)

**Recross-examination.**

We have not the minute book itself containing the minutes of the Board of Directors of the Washington Steel & Bolt Company. We have no authenticated copy of all of their minutes. We have signed and authenticated copies of some of the minutes, and which are the ones produced in evidence. Other than these we have no other copies or purported copies of the minutes of the meetings of the Washington Steel & Bolt Company. [201]

Deposition introduced and received in evidence. Taken at the request of Washington Trust Co.

**Deposition of Jacob H. Osborne.**

Taken in Chicago, Illinois, Mar. 24, 1914.

I reside in Chicago, Illinois. I am in the real estate and bond business and have been for eight or ten years. I know the Washington Steel & Bolt Company, the Bankrupt in the above-entitled action. I am the owner of some of the bonds executed by that company secured by the trust deed or mortgage executed by that company to the Washington Trust Company under date of Sept. 1, 1908. These bonds were purchased by me from A. C. McPhaden, President of the company, whom I believed and still believe to have been acting in its behalf. The bonds purchased were eight bonds of the denomination and par value of \$500 each, thirty bonds of \$100 each, making a total of \$7000., which I paid for the bonds. These bonds at the present time are in the hands of my attorneys, Danson, Williams and Danson of Spokane, Washington. Nothing has been paid on ac-

(Deposition of Jacob H. Osborne.)

count of the principal. To best of my recollection, the last interest coupons paid were the coupons which fell due September 1, 1911, and no part of the interest accruing upon the bonds and evidenced by such coupons payable at any date subsequent to Sept. 1, 1911, has been paid.

I requested the Washington Trust Company to proceed to foreclose its mortgage. My letter was dated August 29, 1912. This letter was received in evidence and is petitioners' Exhibit "26."

**Cross-examination.**

I do not know the exact date of the purchase of these bonds. According to my best recollection, I purchased them in the fall of the year 1909. They were bought from the Washington Steel & Bolt Company through Mr. McPhaden, President of the Company. They were purchased at the same time, as one transaction. I paid \$7000.00 for the bonds with funds in the hands of Mr. McPhaden belonging to me. [202]

Hearing before JNO. P. HOYT, Referee in Bankruptcy, November 20, 1912 in Seattle.

**Deposition of A. C. Gunn.**

(Witness on behalf of Washington Trust Company.)

My name is A. C. Gunn. I reside in Seattle and my business is real estate and banking. I am acquainted with the property of the Washington Steel & Bolt Company and also with Mr. Chavelle, Trustee in Bankruptcy of that company. Mr. Chavelle and



(Deposition of A. C. Gunn.)

myself had several conversations in regard to financing of the company after the plant went into bankruptcy. These conversations ranged up until some time in July of this year. We were endeavoring to have the proposition financed and put the company on its feet. While these negotiations were pending I spent some money. I could not give the amount exactly. I paid the Washington Trust Company \$700, remitting it by telegraph. The date of the receipt is Mar. 1, 1912. I directed the application of the \$700. \$500 of that amount was to take up the interest which became due Sept. 1, 1911. That is, interest on the bonds. I directed that the balance be applied on the note which the Washington Steel & Bolt Company owed the Washington Trust Company. This was done with a view to preclude foreclosure at that time. I do not know whether Mr. Chavelle knew that this money had been sent. My impression is that I told him, but I do not remember. (The receipt given Mr. Gunn signed by the manager of the Western Union Telegraph Company for \$700 above mentioned was received in evidence and marked Exhibit No. 3.) (The letter from the Washington Trust Company to A. C. Gunn & Co. acknowledging receipt of the \$700 was received in evidence and is marked Exhibit No. 4.)

Q. What was your understanding regarding the interest on the bonds held by the Bank of Montreal.

A. My understanding of this transaction was that the interest on the notes which they held of the company was payable [202½] monthly, while their

(Deposition of A. C. Gunn.)

coupons that depended on that for the interest would come in every six months. For that reason I understood that the coupons were not sent in at the time that they became due, because they did not become due at the time of the payment of the interest. I sent the Bank of Montreal \$500. This was to go to the payment of interest on the notes. Mr. Hadley represented me in these transactions. He attended to most of the matter for me.

**Cross-examination.**

Mr. McPhaden is not employed by me or associated with me in business in any manner. My idea in paying the Bank of Montreal the \$500 was in order to stave off bringing proceedings until we could get negotiations for financing the plant. McPhaden officed with me. [203]

**Deposition of E. S. Hadley.**

November 20, 1912. In Seattle, Wn.

(Witness on behalf of Washington Trust Company.)

I am a practicing lawyer in this city. I have been practicing over ten years. I represented Mr. Gunn in his efforts to finance the bankrupt. I represented Mr. Gunn in a number of matters. Along in the spring sometime, cannot tell just when, Mr. Gunn talked of reorganizing this concern and getting it out of bankruptcy and getting it on its feet; and he had me see Mr. Chavelle with regard to what it would cost or how much money it would take to get a composition of the creditors and get the company



(Deposition of E. S. Hadley.)

out of the bankruptcy court. I saw Mr. Chavelle a number of times. I do not know how many. We agreed (that is, Mr. Chavelle and myself) that if we (Gunn and myself) could get \$2500, Mr. Chavelle could enter into a proposition with the creditors and get the creditors to compromise and our offer was to give the creditors this money or so much money, whatever portion that we should get in, and then give them notes of the company, or a note, a new bond issue as soon as the company was in position where the bonds could be raised and retire the old bonds, giving them new bonds of the company. Mr. Chavelle agreed to that and Mr. Gunn paid to me on Mar. 11, \$2500, and I told Mr. Chavelle as soon as I got it that I had the money. We also had several talks about how much the creditors were getting and what the fees would be for receiver and the expenses, etc. and it was understood how much that should be. Mr. Chavelle showed me some papers one day that he purported to have the names of all the creditors and he said that he represented practically all of them, and showed me what purported to be the composition. I suppose it was arranging the composition with the creditors that prevented the carrying through of the agreement. At least, that is what I thought it was, I was ready to put the deal through. I had the money to pay out. [204]

Cross-examination.

I think I told Mr. Chavelle, although I would not be sure about it, that Mr. Gunn had said that he had sent the Bank of Montreal some money. I think I

(Deposition of E. S. Hadley.)

told Mr. Chavelle that it was my understanding that the matter could be arranged with the Bank of Montreal. The \$2500 was paid back to Mr. Gunn by myself. Mr. Chavelle and I agreed that he was to receive either \$500 or \$600 for his services as trustee and the rest of it was to go to the creditors and Mr. Gunn was to take care of the preferred creditors, who were the men that had done labor up there and who had a preferred claim. He was to pay the taxes in addition. [205]

**Exhibits of Washington Trust Company.**

(NOTE: As there were several different hearings, some of the exhibits bear the same number.)

Exhibit 1. Depositions.

Exhibit 1. Bill of sale from Gallant to Chapin of one \$1,000 bond and other shares of stock.

Exhibit 2. Trust Deed or mortgage of Washington Steel & Bolt Co., to the Washington Trust Co., Trustee.

Exhibit 2, 3, 4, 5, and 6. Bonds of C. F. Chapin aggregating \$2,500 in amount.

Exhibit 3. Receipt of Western Union Telegraph Co. to A. C. Gunn for \$700, to be transmitted to The Washington Trust Co., dated March 1, 1912.

Exhibit 4. Letter from The Washington Trust Company to A. C. Gunn & Company acknowledging receipt of \$700, of which amount \$500, was to be applied in the interest on the interest on the bonds and the balance on the note of the Washington Steel & Bolt Company.

Exhibit 7. Check of Meta McElroy dated June 16,



1909, payable to A. McPhaden for \$1,500, endorsed by McPhaden.

Exhibit 8. Check of Meta McElroy, dated Sept. 26, 1908, payable to DeBogart for \$360, and endorsed by DeBogart.

Exhibit 9, 10, 11, 12, 13, 14 and 15. Bonds of Meta McElroy aggregating \$2,000, in amount.

Exhibit 16, 17, 18, 19 and 20. Bonds of the Bank of Montreal, aggregating \$47,900 in amount.

Exhibit 21. Request of the Bank of Montreal dated Feb. 19, 1912, to The Washington Trust Company to foreclose on the Trust Deed of Washington Steel & Bolt Company.

Exhibit 22. Promissory note signed by A. McPhaden and A. G. Pike, payable to Washington Steel & Bolt Company for sum of \$10,000, dated May 1, 1909, and endorsed by the [206] Washington Steel & Bolt Company.

Exhibit 23. Promissory note signed by A. McPhaden and A. G. Pike payable to Washington Steel & Bolt Company for the sum of \$5,000, dated May 11, 1909, and endorsed by Washington Steel & Bolt Company.

Exhibit 24. Promissory note signed by A. McPhaden and A. G. Pike payable to Washington Steel & Bolt Company for the sum of \$2,500, dated June 16, 1909, and endorsed by Washington Steel & Bolt Company.

Exhibit 25. Promissory note signed by A. McPhaden and A. G. Pike, payable to Washington Steel & Bolt Company for the sum of \$2,500, dated July 28, 1909, and endorsed by Washing-

ton Steel & Bolt Company.

Exhibit 26. Request of J. H. Osborne addressed to The Washington Trust Company dated Aug. 29, 1912, that the latter foreclose deed of trust of Washington Steel & Bolt Co.

Exhibit 27. Copy of minutes of meeting of trustees of Washington Steel & Bolt Co. held on Sept. 1, 1908, authorizing execution of trust deed and selling bonds and commission of 5% for selling, and discount in addition of 5% to McPhaden, and other matters.

Exhibit 28. Request of Washington Steel & Bolt Company to deliver to Pike bonds to amount of 2,693.85, allowing agents commission of 5% and discount of 5% dated Sept. 1, 1908, or 4 bonds of \$500 and 9 bonds of \$100, and stating that this would leave Pike a credit of \$63.23 on the books of Co.

Exhibit 29. Request of Washington Steel & Bolt Company to The Washington Trust Company to deliver McPhaden \$21,128.20 in bonds with same allowance as above or say 20 bonds \$1,000 each, 6 bonds of \$500 each and 3 bonds of \$100 each, dated Sept, 1, 1908, upon his paying \$58.32 in cash. [207]

Exhibit 30. Order from Washington Steel & Bolt Co. to The Washington Trust Co. to issue to McPhaden six \$500 bonds, seven \$100 bonds, total \$3,700 in bonds, dated Dec. 28, 1908.

Exhibit 31. Copy of special meeting of Trustees of Washington Steel & Bolt Company on Apr. 30, 1909, authorizing:



1. That Bank of Montreal be made depository for company's funds and that the banking be transferred to said bank.
2. The President and Treasurer to negotiate such loans from time to time as they deemed necessary to further the interests of the company.
3. Secretary to notify Washington Trust Company to deliver to McPhaden bonds to the amount of \$20,000, on presentation of McPhaden's note for that amount, less 5% of the face value of bonds and 5% commission.

Exhibit 32. Letter from Washington Steel & Bolt Company to McPhaden dated May 3, 1909, enclosing copy of minutes of Trustees' Meeting of Apr. 30, 1909, so that he might present same to Washington Trust Co.

Exhibit 33. Special meeting of Trustees of Washington Steel & Bolt Company of June 29, 1909, resolving:

1. That Washington Trust Co. pay bondholders the interest accrued on said bonds.
2. That Washington Trust Co. accept return of all or any of bonds issued to McPhaden under authority of Board of Trustees of Apr. 30, 1909, and return McPhaden's notes.

Exhibit 34. Letter dated Nov. 11, 1909, from Washington Steel & Bolt Company to Washington Trust Co., directing it to issue remaining \$1,500 of bonds in addition to \$4,500 of the bonds is-

sued pursuant to Exhibit 31 to McPhaden (two \$500 and five \$100) and also to return McPhaden's notes for \$4,050, held against said \$4,500 of bonds as McPhaden wishes [208] to cover his account with Washington Steel & Bolt Co. bonds.

Exhibit 35. Order from Washington Steel & Bolt Co. to Washington Trust Co., directing it to issue to McPhaden \$1,000 in bonds (one \$500 and five \$100) dated Feb. 19, 1910.

Exhibit 36. Letter from Washington Steel & Bolt Co. to The Washington Trust Company to effect that McPhaden's account showed credit of \$2,404.74 dated Feb. 19, 1910.

Exhibit 37. Minutes of Meeting of Board of Trustees of Washington Steel & Bolt Co. on Mar. 20, 1911, authorizing that \$25,000 of the company's unsold bonds be placed with the Bank of Montreal as collateral on a \$20,000 loan that the company owes, and an order be given the Washington Trust Co. to deliver the same to the Bank.

Exhibit 38. The order to the Washington Trust Co. in accordance with the above resolution and the Bank's receipt for the bonds.

Exhibit 39. Receipt of Bank to Washington Trust Company for \$25,000 bonds showing the par value of each bond.

Exhibit 40. Telegram from Washington Trust Co. to Washington Steel & Bolt Co., requesting a wire as to when remittance for interest on bonds would arrive.



Exhibits 40 to 47 inclusive. Bonds of Thomas S. Burley aggregating \$2,600 in amount.

Exhibit 48. Six interest bearing coupons of denomination of \$4 each, and two interest bearing coupons of \$40 each, of T. S. Burley.

Exhibit 49. Contract between Burley and McPhaden whereby the former acquired three \$1,000 bonds.

Exhibits 50, 51 and 52, bonds 410, 653 and 654 claimed to belong to J. H. Osborne, aggregating \$1,100 in amount. The remaining bonds, bonds 410 to 438, both inclusive, and [209] Nos. 655 to 660, both inclusive, were received in evidence under objection as part of the deposition of R. L. Webster, but were not marked with numbers as exhibits.

Exhibit 54. Delinquent Tax statement.

Exhibit 53. Certificate of commissioner of Public Lands re property of Washington Steel & Bolt Company.

Exhibit 55. Pencil Tracing of Lots.

Exhibits 56 and 57. Cash Book and Journal of Washington Steel & Bolt Company.

#### **Trustee's Exhibits.**

Exhibits "A," "B," "C," "D," "E," "F," and "G"—Letters from A. McPhaden to A. G. Pike.  
[210]

#### **[Order Approving Statement of Evidence, etc.]**

The foregoing is a true and complete statement of the evidence taken before the referee herein, including a statement of the contents of petitioner's ex-

hibits, in so far as it is essential to the questions presented by the appeals of both the Trustee in Bankruptcy, and The Washington Trust Company, both appellants having agreed to submit their respective appeals on the foregoing statement of the evidence, and contains all of said evidence and exhibits essential to the decision of said questions and the same is hereby approved.

Dated this 23d day of November, 1914.

JEREMIAH NETERER,

Judge.

[Indorsed]: Statement of the Evidence of Both Appellants. Filed in the United States District Court, Western District of Washington. Nov. 23, 1914. Frank L. Crosby, Clerk. By B. E. S., Deputy.  
[211]

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*In the United States District Court for the Western  
District of Washington, Northern Division.*

No. 4717.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY, a Corporation,

Bankrupt.

**Order [Directing Transmission of Original Exhibits  
to Appellate Court].**

The praecipe for transcript on appeal, filed in the above-entitled matter, having called for the following exhibits to be sent to the United States Circuit Court of Appeals, the Clerk of this court is hereby authorized and directed to send up the original ex-



hibits now on file in this court, which exhibits are as follows, to wit:

Exhibit No. 2, being the deed of trust or mortgage executed in favor of the Washington Trust Company by the Washington Steel & Bolt Company.

Exhibits Nos. 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38 and 39 presented in evidence by The Washington Trust Company.

And also bonds Nos. 702, 661 and 291 of the Washington Steel & Bolt Company presented in evidence by the Washington Trust Company.

And Exhibits "A," "B," "C" and "G," presented by the Trustee in Bankruptcy.

Dated this 18th day of December, 1914.

JEREMIAH NETERER,

Judge.

O. K.—Russell.

[Endorsed]: Order. Filed in the United States District Court, Western District of Washington. Dec. 18, 1914. Frank L. Crosby, Clerk. By S. E. Leitch, Deputy. [212]

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*In the District Court of the United States in and for the Western District of Washington, Northern Division.*

No. 4717.

In the Matter of WASHINGTON STEEL & BOLT COMPANY, a Corporation,

Bankrupt.

**Order Enlarging Time to Make Return [to Citations Thirty Days from October 26, 1914].**

For good cause shown, the time for making return on each of the two citations on the two appeals, filed by the parties in this case, and signed by the Judge of this court on October 26th, 1914, is hereby enlarged to thirty days from this date.

WITNESS the Honorable Edward D. White, Chief Justice of the United States, this 23d day of November, 1914.

JEREMIAH NETERER,  
United States District Judge for the said District  
and Division.

[Endorsed]: Order Enlarging Time to Make Return. Filed in the U. S. District Court, Western Dist. of Washington. Nov. 23, 1914. [213]

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*In the District Court of the United States in and for  
the Western District of Washington, Northern  
Division.*

No. 4717.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY, a Corporation,

Bankrupt.

**Order Enlarging Time to Make Return [on Citations to January 9, 1915, etc.].**

For good cause shown, the time for making return on each of the two citations on the two appeals, filed by the parties in this case, and signed by the Judge



of this court on October 26, 1914, is hereby enlarged to January 9, 1915.

The Clerk of this court is hereby directed to forward this order together with the order of this Court signed on November 23, 1914, enlarging the time to make return, to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit in accordance with Rule 16 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 18th day of December, 1914.

JEREMIAH NETERER,

United States District Judge for the Said District and Division.

O. K.—Russell.

[Endorsed]: Order Enlarging Time to Make Return. Filed in the United States District Court, Western District of Washington. Dec. 18, 1914. Frank L. Crosby, Clerk. By S. E. Leitch, Deputy.  
[214]

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*In the District Court of the United States for the Western District of Washington, Northern Division.*

No. 4717.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY, a Corporation,

Bankrupt.

**Citation on Appeal [of Trustee (Copy)].**

United States of America,  
Western District of Washington,  
Northern Division,—ss.

The President of the United States, to The Wash-  
ington Trust Company, and to James B. Murphy,  
Its Attorney:

You, and each of you, are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date of the signing of this citation, pursuant to an appeal filed in the office of the Clerk of the United States District Court for the Western District of Washington, Northern Division, wherein Edward H. Chavelle, as trustee of the above-named bankrupt, is appellant and you are appellee, and to show cause, if any there be, why so much of the final order and judgment in said appeal mentioned should not be corrected and reversed and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 26th day of October, 1914.

[Seal] JEREMIAH NETERER,  
United States District Judge for the Said District  
and Division.

Attest: Frank L. Crosby, Clerk. By S. E. Leitch,  
Deputy Clerk.



I hereby accept due and legal service of the foregoing citation this 26th day of October, 1914.

JAMES B. MURPHY,  
Attorney for Petitioner, The Washington Trust Company. [215]

[Endorsed]: No. 4717. In the District Court of the United States for the Western District of Washington, Northern Division. In the Matter of Washington Steel & Bolt Company, a Corporation, Bankrupt. Citation on Appeal. Filed in the United States District Court, Western District of Washington. Oct. 26, 1914. Frank L. Crosby, Clerk. By B. E. S., Deputy. Service of papers, except process, in this case may be made upon J. W. Russell, Attorney for Trustee in Bankruptcy, 714 Lowman Building. Phones Main 1282. Independent 502. Seattle, Washington. [216]

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**[Praeipie of Trustee for transcript of Record.]**

*In the District Court of the United States for the Western District of Washington, Northern Division.*

No. 4717.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY, a Corporation,  
Bankrupt.

**PRAECIPE FOR TRANSCRIPT.**

To the Clerk:—

You will please prepare, duly authenticate, and send to the United States Circuit Court of Appeals for the Ninth Circuit, a Transcript herein, consist-

ing of the following portions of the record herein:—

Petition for appeal, and order allowing same.

Assignment of errors.

Citation on appeal.

Praecipe.

The adjudication.

Order appointing receiver.

Order appointing trustee.

Petition of The Washington Trust Company for leave to foreclose.

Amended answer to the trustee.

Report of Referee (July 20, 1914).

Order of Referee (July 20, 1914).

Petition for review of report and order of July 20, 1914.

Opinion of Judge Neterer filed September 15, 1914.

Order reviewing report and order of July 20, 1914.

Statement of evidence.

J. W. RUSSELL,

Attorney for Trustee in Bankruptcy.

I hereby accept due and timely service of the foregoing Praecipe for Transcript this 26th day of October, 1914.

JAMES B. MURPHY,

Attorney for Petitioner, The Washington Trust Company. [217]

I waive the provisions of the Act approved February 13, 1911, and direct that you forward type-written transcript to the Circuit Court of Appeals for printing as provided under Rule 105 of this court.

J. W. RUSSELL,

Attorney for Trustee in Bankruptcy.



[Endorsed]: Praecipe for Transcript. Filed in the United States District Court, Western District of Washington. Oct. 26, 1914. Frank L. Crosby, Clerk. By B. E. S., Deputy. [218]

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*In the United States District Court for the Western District of Washington, Northern Division.*

No. 4717.

In the Matter of WASHINGTON STEEL & BOLT COMPANY, a Corporation,

Bankrupt.

**Citation [on Appeal of Washington Trust Co. (Copy)].**

United States of America,  
Western District of Washington.

The President of the United States, to the Washington Steel & Bolt Company, the Above Bankrupt and to Edward H. Chavelle, Trustee in Bankruptcy of the Said Washington Steel & Bolt Company, Greeting:

You, and each of you, are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco in the State of California, within thirty (30) days from the date of this citation, pursuant to an appeal filed in the Clerk's office of the United States District Court for the Western District of Washington, Northern Division, wherein the Washington Trust Company, the petitioner for leave to foreclose its mortgage, is ap-

pellant, and you are appellees, to show cause, if any there be, why the judgments in said appeal mentioned should not be corrected and speedy justice should not be done the parties in that behalf.

WITNESS the Honorable Edward D. White,  
Chief Justice of the United States Supreme Court,  
this 26 day of October, 1914.

JEREMIAH NETERER,  
United States District Court Judge, Presiding Over  
the Above-entitled Court.

[Seal] Attest: FRANK S. CROSBY,  
Clerk.

By S. E. Leitch,  
Deputy. [219]

Due service of the within Citation acknowledged,  
and a true copy received this 26th day of Oct., 1914.

J. W. RUSSELL,  
Attorney for Trustee in Bankruptcy.

[Endorsed]: Citation. Filed in the United States  
District Court, Western District of Washington.  
Oct. 26, 1914. Frank L. Crosby, Clerk. By B. E. S.,  
Deputy. [220]

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**[Praeipie of Washington Trust Co. for Transcript  
on Appeal.]**

*In the United States District Court for the Western  
District of Washington, Northern Division.*

No. 4717.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY, a Corporation,  
Bankrupt,



## PRAECIPE FOR TRANSCRIPT ON APPEAL.

To the Clerk of the Above-entitled Court:

Will you kindly prepare, duly authenticated, and send to the United States Circuit Court of Appeals, Ninth Circuit, a transcript of the record herein containing the following items, making one record of the items contained in this praecipe and the items filed on behalf of the Trustee in Bankruptcy on the 26th day of October, 1914.

Memorandum decision filed by the Referee in Bankruptcy on November 26, 1912.

Order entered by the Referee on December 19, 1912, passing upon the petition of the Washington Trust Company.

Petition for Review filed with the Referee on December 28, 1912.

Memorandum decision of the Judge of the District Court filed herein February 7, 1913.

Order of the District Court referring this case back to the Referee filed March 3, 1913.

Reply of the Washington Trust Company filed herein on April 25, 1913.

Memorandum decision of the Referee filed herein on May 15, 1913.

Order of the Referee denying the petition of the Washington Trust Company filed June 16, 1913.

Petition of the Washington Trust Company for review filed with the Referee on June 20, 1913.

Memorandum decision of the District Court filed herein on September 22, 1913. [221]

Order of the District Court reversing the order of Referee filed herein on November 14, 1913.

Petition of the Trustee in Bankruptcy to sell the property of the bankrupt filed herein December 10, 1913.

Answer of the Washington Trust Company to the petition to sell filed with the Referee April 13, 1914.

Exceptions of the Washington Trust Company to the order of the Referee, which exceptions were also filed on July 20, 1914.

Exceptions to the order disallowing the claim filed herein on July 21, 1914.

Order of the Referee directing a sale of the property filed herein on July 28, 1914.

Stipulation that all testimony taken at previous hearings might be considered filed herein July 30, 1914.

Petition for review of the order directing a sale of the property which was filed herein July 31, 1914.

Exceptions of the Washington Trust Company to the order entered by the District Judge October 16, 1914, which exceptions were also filed on October 16, 1914.

Proposed provisions of an order presented for signing, together with the refusal to sign the same, which proposal was filed October 16, 1914.

Order of the District Judge confirming order directing the sale of the property, which order was entered by the District Judge on October 16, 1914.

Exceptions of the Washington Trust Company to said order filed herein on same date.

Petition for appeal filed herein by the Washington Trust Company and the order allowing the same.

The assignments of error filed by the Washington



Trust Company in support of its appeal.

Bond filed by the Washington Trust Company in support of its appeal, together with the Judge's approval thereof.

The petition of the Washington Trust Company for supervision and revision by the Circuit Court of Appeals of orders, judgments and proceedings mentioned in said petition. [222]

The citation issued on the appeal of the Washington Trust Company, together with the admission of service thereon.

Order of Nov. 23, enlarging time within which to make return.

This Praeceptum.

Order of District Court dated Oct. 26, 1914, extending time to file praecipe for record on appeal and narrative statement of evidence.

Order of Nov. 2, 1914, extending time to file praecipe and statement of evidence.

All the exhibits of the Washington Trust Company which purport to be Deed of Trust, Minutes, or copies of Minutes, passed by the Board of Trustees of the Washington Steel & Bolt Company, and orders or requests of Washington Steel & Bolt Company made on the Washington Trust Co. in regard to the bonds, which exhibits are designated as follows:

Exhibit No. 2 Deed of Trust or Mortgage in favor of Washington Trust Co.

Exhibit 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39.

Order of Nov. 5, 1914, extending time for filing praecipe and statement.

Order of Nov. 10, 1914, extending time for filing praecipe and narrative statement of evidence to Nov. 16, 1914.

Order of Nov. 16, 1914, extending time for filing praecipe and narrative statement of evidence to Nov. 23, 1914.

Bond No. 702 of the Washington Steel & Bolt Co.

JAMES B. MURPHY,

Attorney for Washington Trust Company,

I hereby acknowledge due, regular and timely service of the foregoing praecipe for transcript this 23d day of November, 1914.

J. W. RUSSEL,

Attorney for Trustee in Bankruptcy.

I waive the provisions of the Act approved February 13, 1911, and direct that you forward type-written transcript to the Circuit Court of Appeals for printing as provided under Rule 105 of this Court.

JAMES B. MURPHY,

[Endorsed]: Praecipe for Transcript on Appeal. Filed in the United States District Court, Western District of Washington. Nov. 23, 1914. Frank L. Crosby, Clerk. By B. E. S. Deputy. [223]



**[Certificate of Clerk U. S. District Court to  
Transcript of Record.]**

*In the District Court of the United States for the  
Western District of Washington, Northern Division.*

No. 4717.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY, a Corporation,

Bankrupt,

**Clerk's Certificate to Transcript of Record.**

United States of America,  
Western District of Washington,—ss.

I, FRANK L. CROSBY, Clerk of the United States District Court, for the Western District of Washington, do hereby certify the foregoing 227 typewritten pages numbered from 1 to 227 inclusive, to be a full, true, correct and complete copy of so much of the record and proceedings in the above and foregoing entitled cause as is called for by the Praeceptum of the Attorneys for the Appellants and Appellees, as the same remain of record and on file in the office of the Clerk of the said Court, and that the same constitute the transcript of record on appeal from the District Court of the United States for the Western District of Washington to the Circuit Court of Appeals for the Ninth Judicial Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on be-

half of the Appellants for making typewritten transcript of record to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause to wit: [224]

Clerk's fee (Sec. 828 R. S. U. S. for making typewritten transcript of record—532 folios at 15¢.....	\$79.80
Certificate of Clerk to Transcript of record—3 folios at 15¢.....	.45
Seal to said Certificate.....	.20
Certificate of Clerk to Original Exhibits—2 folios at 15¢.....	.30
Seal to said Certificate.....	.20
	<hr/>
	\$80.95

I hereby certify that the above cost for preparing and certifying record amounting to \$80.95 has been paid to me by James B. Murphy, Esquire, (\$58.80) and J. W. Russel, Esquire, (\$22.15) Attorneys for Appellants.

I further certify that I hereto attach and herewith transmit the original Citations issued in this cause.

IN WITNESS WHEREOF I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 2d day of January, 1915.

[Seal]

FRANK L. CROSBY,  
Clerk. [225]



*In the District Court of the United States for the  
Western District of Washington, Northern Divi-  
sion.*

No. 4717.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY, a Corporation,

Bankrupt,

**Citation on Appeal [of Trustee (Original)].**

United States of America,  
Western District of Washington,  
Northern Division,—ss.

The President of the United States, to the Wash-  
ington Trust Company, and to James B. Mur-  
phy, its attorney:—

You, and each of you, are hereby cited and admon-  
ished to be and appear in the United States Circuit  
Court of Appeals for the Ninth Circuit, at San  
Francisco, California, within thirty days from the  
date of the signing of this citation, pursuant to an  
appeal filed in the office of the Clerk of the United  
States District Court for the Western District of  
Washington, Northern Division, wherein Edward  
H. Chavelle, as trustee of the above-named bank-  
rupt, is appellant and you are appellee, and to show  
cause, if any there be, why so much of the final order  
and judgment in said appeal mentioned should not  
be corrected and reversed and why speedy justice  
should not be done the parties in that behalf.

Witness the Honorable Edward D. White, Chief

Justice of the United States, this 26th day of October, 1914.

[Seal] JEREMIAH NETERER,  
United States District Judge for said District and  
Division.

Attest:

FRANK L. CROSBY,  
Clerk.

By S. E. Leitch,  
Deputy Clerk.

I hereby accept due and legal service of the foregoing citation this 26th day of October, 1914.

JAMES B. MURPHY,  
Attorney for Petitioner, The Washington Trust  
Company. [226]

[Endorsed]: No. 4717. In the District Court of the United States for the Western District of Washington, Northern Division. In the Matter of Washington Steel & Bolt Company, a Corporation, Bankrupt. Citation on Appeal. Filed in the United States District Court, Western District of Washington. Oct. 26, 1914. Frank L. Crosby, Clerk. By B. E. S., Deputy.

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*In the United States District Court for the Western  
District of Washington, Northern Division.*

No. 4717.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY, a Corporation,  
Bankrupt,



**Citation [on Appeal of Washington Trust Co.  
(Original)].**

United States of America,  
Western District of Washington,—ss.

The President of the United States, to the Washington Steel & Bolt Company, the Above Bankrupt and to Edward H. Chavelle, Trustee in Bankruptcy of the said Washington Steel & Bolt Company, Greeting:

You, and each of you, are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco in the State of California, within thirty (30) days from the date of this citation, pursuant to an appeal filed in the Clerk's office of the United States District Court for the Western District of Washington, Northern Division, wherein the Washington Trust Company, the petitioner for leave to foreclose its mortgage, is appellant, and you are appellees, to show cause, if any there be, why the judgments in said appeal mentioned should not be corrected and speedy justice should not be done the parties in that behalf.

WITNESS the Honorable Edward D. White,  
Chief Justice of the United States Supreme Court

this 26 day of October, 1914.

[Seal] JEREMIAH NETERER,  
United States District Court Judge Presiding over  
the above-entitled court.

ATTEST:

FRANK L. CROSBY,  
Clerk.

By S. E. Leitch,  
Deputy. [227]

Due service of the within citation acknowledged  
and a true copy received this 26 day of Oct. 1914.

J. W. RUSSELL,  
Attorneys for Trustee in Bankruptcy.

[Endorsed]: No. 4717. In the United States  
District Court for the Western District of Wash-  
ington, Northern Division. In the Matter of  
Washington Steel & Bolt Co., a Corporation, Bank-  
rupt. Citation. Filed in the United States Dis-  
trict Court, Western District of Washington. Oct.  
26, 1914. Frank L. Crosby, Clerk. By B. E. S.,  
Deputy.

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[Endorsed]: No. 2512. United States Circuit  
Court of Appeals for the Ninth Circuit. Edward  
H. Chavelle, as Trustee in Bankruptcy of Washing-  
ton Steel & Bolt Company, a Corporation, Bank-  
rupt, Appellant, vs. Washington Trust Company, a  
Corporation, Appellee, and Washington Trust Com-  
pany, a Corporation, Appellant, vs. Washington  
Steel & Bolt Company, a Corporation, Bankrupt  
and Edward H. Chavelle, as Trustee in Bankruptcy  
of Washington Steel & Bolt Company, a Corpora-



tion, Bankrupt, Appellees. In the Matter of Washington Steel & Bolt Company, a Corporation, Bankrupt. Transcript of Record. Upon Appeals from the United States District Court for the Western District of Washington, Northern Division.

Filed January 4, 1915.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

TRUSTEE'S CERTIFICATE

It is hereby certified that this bond is one of a series of bonds described in a mortgage or deed of trust therein mentioned, executed by the *Washington Steel & Bolt Company* to the undersigned as *Trustee*, bearing date the first day of September, A. D. 1908.

The *WASHINGTON TRUST COMPANY*, Trustee.

By *R. H. L. Underhill*

July 12, 1911 Registered in the name of the Bank of Montreal.

The *Washington Trust Company*

By *R. H. L. Underhill*



*Petitioner Exhibit 16*  
*Doc. No. 12 co - 4*

**WASHINGTON  
 STEEL & BOLT  
 COMPANY.**  
 OF EDMONDS, WASH.

**3 PERCENT  
 TEN YEAR  
 FIRST MORTGAGE  
 GOLD BOND**

*16*

**\$1000**

Principal Due, Sept<sup>1</sup> 1918.  
 Interest Payable March 1<sup>st</sup> & Sept<sup>1</sup>

PRINCIPAL AND INTEREST PAYABLE AT  
 THE WASHINGTON TRUST COMPANY  
 SPOKANE, WASH.

Case No. 2512  
 U. S. Circuit Court of Appeals  
 For the Ninth Circuit

*Petitioner* Exhibit 16  
 Received June 5, 1912  
 P. D. MORGENTHAU, Clerk



State of  
**United States of America**  
 Washington

# Washington Steel & Bolt Company

EDMONDS, WASHINGTON.

## FIRST MORTGAGE EIGHT PER CENT GOLD BOND.

**Know all Men by These Presents:** That WASHINGTON STEEL & BOLT COMPANY, a corporation duly organized and existing under the laws of the State of Washington, for value received, acknowledges itself indebted to the bearer of this bond, or if this bond be registered to the registered holder thereof in the sum of One Thousand (\$1000) Dollars (or Five Hundred (\$500) Dollars or One Hundred (\$100) Dollars as the case may be) which it hereby promises and agrees to pay in United States gold coin of the present standard of weight and fineness, on the first day of September, 1918, at the office of The Washington Trust Company, Trustee, in the City of Spokane, County of Spokane, State of Washington, with interest thereon from the date of issue or sale thereof until paid, at the rate of eight (8%) per centum per annum payable semi-annually in like gold coin on the first day of March and September in each year on the presentation and surrender of the coupons annexed hereto, as they severally become due; all payments upon this bond, both of the principal and interest shall be made without deduction for any tax or taxes that said Washington Steel & Bolt Company may be required to pay or to retain therefrom by any present or future laws of the United States of America, or of the State of Washington, said Washington Steel & Bolt Company hereby covenanting and agreeing to pay any and all such tax or taxes.

This bond is one of a series of Seven Hundred and Fifty (750) bonds, all of the same tenor and date, numbered consecutively from one (1) to and including the number Seven Hundred and Fifty (750). The first Five Hundred (500) bonds being of the denomination of One Hundred (\$100) Dollars each and Two Hundred (200) bonds being of the denomination of Five Hundred (\$500) Dollars each and Fifty (50) bonds being of the denomination of One Thousand (\$1000) Dollars each, and all said bonds with the coupons thereto attached, are equally secured by a first mortgage or deed of trust, duly executed and delivered by the said Washington Steel & Bolt Company to The Washington Trust Company in Spokane, County of Spokane, State of Washington, as Trustee, subject to all the provisions and conditions therein, bearing even date with this bond, authorized by said WASHINGTON STEEL & BOLT COMPANY to be issued to an amount not exceeding in the aggregate the principal sum of Two Hundred Thousand (\$200,000) Dollars, nevertheless, with the understanding that Seventy-Five Thousand (\$75,000) Dollars of said bonds shall be issued and placed on the market on the execution and delivery of this said Indenture, and the balance of One Hundred and Twenty-Five Thousand (\$125,000) Dollars of said bonds to be held by the Trustee, and not issued and put on the market only in the event and at such time in the future as the Trustees of said Washington Steel & Bolt Company may deem to be for the best interests of said company, and covering and conveying all real property and personal property owned by said WASHINGTON STEEL & BOLT COMPANY, and more particularly described in said mortgage, and to which reference is hereby made for the nature and extent of the security and the rights of the holders of these bonds, and the terms and conditions thereof, which is duly recorded in the office of the County Auditor of Snohomish County, State of Washington; in case default shall be made and shall continue for six (6) months in the payment of any interest on any of the bonds secured by this Indenture, the principal of the said bonds with all the interest accrued and unpaid thereon, shall become due and payable at the election and upon declaration of the owners of one-third in amount of said bonds, then outstanding.

This bond may pass by delivery but may be registered as to the number thereof, upon the transfer book of the Trustee at its office, and after such registration duly certified hereon by the Trustee this bond shall be transferred only on said books, unless transfer be to bearer, when it shall again be transferred by delivery subsequent to registration in like manner: This bond shall not become obligatory until it shall have become authenticated by the certificate of the Trustee endorsed hereon.

No recourse shall be had for the payment of the principal or interest of this bond, against any individual incorporator, stockholder, officer or trustee of said Washington Steel & Bolt Company, and any and all liabilities of incorporators, stockholders, trustees and officers of the said Washington Steel & Bolt Company individually being hereby released.

In Witness Whereof, the said WASHINGTON STEEL & BOLT COMPANY has caused these presents to be signed and executed in its corporate name by its President, and counter-signed by its Secretary, and its corporate seal hereto affixed, and the coupons for interest being authenticated by the engraved signature of its Treasurer to be attached hereto, this First day of September, 1908, all pursuant to legal authority in them vested to that end.

WASHINGTON STEEL & BOLT COMPANY,

President.

ATTEST:

Secretary.



\$40.00 (XXX COUPON No. 20 XXX) \$40.00  
**WASHINGTON STEEL & BOLT COMPANY.**  
 EDMONDS, WASH.  
 Will pay to the bearer on the first day of **SEPTEMBER, 1918**  
 at the office of the **WASHINGTON TRUST COMPANY** in the city of **SPOKANE,**  
 of the county of **SPOKANE,** STATE OF **WASHINGTON,** **FORTY DOLLARS**  
 in full coin of the UNITED STATES OF AMERICA, BEING SIX (6) MONTHS' INTEREST  
 ON TEN THOUSAND DOLLARS FIRST MORTGAGE GOLD BOND.  
 Bond No. **712** *A. S. Baker*  
 (SIGNED)

\$ 40.00 XXXX COUPON No 10 XXXX \$ 40.00  
**WASHINGTON STEEL & BOLT COMPANY.**  
 EDMONDS WASH  
 PAY TO THE BEARER ON THE FIRST DAY OF **SEPTEMBER, 1913**  
 THE OFFICE OF THE **WASHINGTON TRUST COMPANY** IN THE CITY OF SPOKANE  
 COUNTY OF SPOKANE, STATE OF WASHINGTON **FORTY DOLLARS**  
 TO HOLD FOR THE UNITED STATES OF AMERICA BEING SIX (6) MONTHS INTEREST  
 ON THE FIRST SIX (6) MONTHS FIRST MORTGAGE GOLD BOND  
 No. **704** *U.S. 704*  
 (1902-1903)

\$40.00 (XXX COUPON NO 19 XXX) \$40.00  
**WASHINGTON STEEL & BOLT COMPANY.**  
 EDMONDS, WASH.  
 WILL PAY TO THE BEARER ON THE FIRST DAY OF **MARCH, 1918**  
 AT THE ORDER OF THE **WASHINGTON TRUST COMPANY** IN THE CITY OF SPOKANE,  
 FORTY DOLLARS. **FORTY DOLLARS**  
 BEING A PART OF THE UNITED STATES OF AMERICA, BEING SO (5) MONTHS INTEREST  
 ON THE FIRST MORTGAGE GOLD BOND.

\* 40.00 (XXX) COUPON No 9 (XXX) \* 40.00  
**WASHINGTON STEEL & BOLT COMPANY.**  
 EDMONDS, WASH.  
 PAID TO THE BEARER ON THE FIRST DAY OF **MARCH, 1913**  
 AT THE OFFICE OF THE **WASHINGTON TRUST COMPANY** IN THE CITY OF SPOKANE  
 COUNTY OF SPOKANE, STATE OF WASHINGTON. **FORTY DOLLARS**  
 A GOLD BOND OF THE UNITED STATES OF AMERICA, BEING SIX (6) MONTHS INTEREST  
 ONE AND ONE HALF PER CENT FIRST MORTGAGE GOLD BOND.

\$ 40.00 ( XXX COUPON NO 18 XXX ) \$ 40.00  
**WASHINGTON STEEL & BOLT COMPANY.**  
 EDMONDS, WASH.  
 PAY TO THE BEARER ON THE FIRST DAY OF **SEPTEMBER, 1917**  
 FIVE DOLLARS OF THE **WASHINGTON TRUST COMPANY** IN THE CITY OF SPOKANE.  
 COUNTY OF SPOKANE, STATE OF WASHINGTON. **FORTY DOLLARS**  
 A BOND LOAN OF THE UNITED STATES OF AMERICA, BEING SIX (6) MONTHS INTEREST  
 DUE ON THE FIRST OF THE FIRST MORTGAGE GOLD BOND.

\$ 40.00 (XXX) COUPON NO 8 (XXX) \$ 40.00  
**WASHINGTON STEEL & BOLT COMPANY.**  
 EDMONDS WASH  
 WE PAY TO THE BEARER ON THE FIRST DAY OF **SEPTEMBER 1912**  
 AT THE OFFICE OF THE **WASHINGTON TRUST COMPANY** IN THE CITY OF SPOKANE  
 COUNTY OF SPOKANE, STATE OF WASHINGTON **FORTY DOLLARS**  
 IN FULL OF ONE OF THE UNITED STATES OF AMERICA, BEING SIX (6) MONTHS INTEREST  
 DUE ON THAT DATE ON ITS FIRST MORTGAGE GOLD BOND  
 Bond No. **202** *U.S. 1st*  
 MADE IN U.S.A.

\$ 40.00 ( XXX COUPON No. 17 XXX ) \$ 40.00  
**WASHINGTON STEEL & BOLT COMPANY.**  
 EDMONDS, WASH.  
 PAID ONE TO THE BOURNER ON THE FIRST DAY OF MARCH, 1917  
 AT THE OFFICE OF THE WASHINGTON TRUST COMPANY IN THE CITY OF SPOKANE,  
 COUNTY OF SPOKANE, STATE OF WASHINGTON, **FORTY DOLLARS.**  
 IN GOLD COIN OF THE UNITED STATES OF AMERICA, BEING SIX (6) MONTHS INTEREST  
 PAID ON TIME, DATE, ON ITS FIRST MORTGAGE GOLD BOND.  
 Paid No. *1012*  
*A. B. Baker*  
 TREASURER

\$ 40.00 ( XXXX COUPON No 7 XXXX ) \$ 40.00  
**WASHINGTON STEEL & BOLT COMPANY.**  
 EDMONDS WASH  
 WE PAY TO THE BEARER ON THE FIRST DAY OF **MARCH, 1912**  
 AT THE OFFICE OF THE **WASHINGTON TRUST COMPANY** IN THE CITY OF SPOKANE  
 COUNTY OF SPOKANE, STATE OF WASHINGTON **FORTY DOLLARS**  
 IN GOLD COIN OF THE UNITED STATES OF AMERICA, BEING SIX (6) MONTHS INTEREST  
 DUE ON THAT DATE, ON ITS FIRST MORTGAGE GOLD BOND  
 BOND No. **302**

\$ 40.00 ( XXXX COUPON No. 16 XXXX ) \$ 40.00  
**WASHINGTON STEEL & BOLT COMPANY.**  
 EDMONDS, WASH.  
 WILL PAY TO THE BEARER ON THE FIRST DAY OF **SEPTEMBER, 1916**  
 AT THE OFFICE OF THE **WASHINGTON TRUST COMPANY** IN THE CITY OF SPOKANE,  
 COUNTY OF SPOKANE STATE OF WASHINGTON, **FORTY DOLLARS.**  
 IN GOLD COIN OF THE UNITED STATES OF AMERICA, BEING SIX (6) MONTHS INTEREST  
 DUE ON THAT DATE ON ITS FIRST MORTGAGE GOLD BOND.  
 Bond No. **202** *A B Baker*  
 PAID AS ORDER

\$ 40.00 COUPON NO 6 \$ 40.00  
**WASHINGTON STEEL & MOLT COMPANY.**  
 EDMONDS WASH  
 WILL PAY TO THE BEARER ON THE FIRST DAY OF **SEPTEMBER, 1911**  
 AT THE OFFICE OF THE **WASHINGTON TRUST COMPANY** IN THE CITY OF SPOKANE  
 COUNTY OF SPOKANE, STATE OF WASHINGTON **FORTY DOLLARS**  
 IN GOLD COIN OF THE UNITED STATES OF AMERICA, BEING SIX (6) MONTHS INTEREST  
 DUE ON THAT DATE ON ITS FIRST MORTGAGE GOLD BOND  
 Bond No **702** *U.S. 1st Mort*

\$ 40.00 ( XXXX COUPON No 15 XXXX ) \$ 40.00  
**WASHINGTON STEEL & BOLT COMPANY.**  
 EDMONDS WASH  
 WILL PAY TO THE BEARER ON THE FIRST DAY OF **MARCH, 1916**  
 AT THE OFFICE OF THE **WASHINGTON TRUST COMPANY** IN THE CITY OF SPOKANE,  
 COUNTY OF SPOKANE, STATE OF WASHINGTON, **FORTY DOLLARS**  
 IN GOLD COIN OF THE UNITED STATES OF AMERICA, BEING SIX (6) MONTHS INTEREST  
 ON THE FIRST \$1000 OF ITS FIRST MORTGAGE GOLD BOND.  
 Paid to **208** *A B Baker*  
 regatymh

\$ 40.00 (XXX) COUPON No 5 (XXX) \$ 40.00  
**WASHINGTON STEEL & BOLT COMPANY.**  
 EDMOND3 WASH  
 PAY TO THE BEARER ON THE FIRST DAY OF **MARCH, 1911**  
 AT THE OFFICE OF THE **WASHINGTON TRUST COMPANY** IN THE CITY OF SPOKANE  
 COUNTY OF SPOKANE, STATE OF WASHINGTON, **FORTY DOLLARS**  
 IS SOLO COM OF THE UNITED STATES OF AMERICA, BEING SIX (6) MONTHS INTEREST  
 DUE ON THE DATE OF ITS FIRST MORTGAGE GOLD BOND.  
 Bond No. 742 *U.S. Trust*

\$ 40.00 (XXX COUPON No 14 XXX) \$ 40.00

**WASHINGTON STEEL & BOLT COMPANY.**

EDMONDS, WASH

Will pay to the BEARER on the FIRST DAY of **SEPTEMBER, 1915**  
AT THE OFFICE OF THE **WASHINGTON TRUST COMPANY** IN THE CITY OF SPOKANE,  
COUNTY OF SPOKANE, STATE OF WASHINGTON. **FORTY DOLLARS.**  
IS GOLD COIN OF THE UNITED STATES OF AMERICA, BEING SIX (6) MONTHS INTEREST  
DUE ON THAT DATE ON ITS FIRST MORTGAGE GOLD BOND.

Bond No. **702** *A. S. Baker*  
In Witness Whereof

**\$ 40.00** (~~XXXX~~) COUPON No 4 (~~XXXX~~) **\$ 40.00**

**WASHINGTON STEEL & BOLT COMPANY.**

EDMONDS WASH

PAY TO THE BEARER ON THE FIRST DAY OF SEPTEMBER, 1910  
AT THE OFFICE OF THE WASHINGTON TRUST COMPANY IN THE CITY OF SPOKANE  
COUNTY OF SPOKANE, STATE OF WASHINGTON. FORTY DOLLARS  
IS GOLD COIN OF THE UNITED STATES OF AMERICA, BEING SIX (6) MONTHS INTEREST  
DUE ON THAT DATE ON ITS FIRST MORTGAGE GOLD BOND.

No. 702 U.S. DEPT. OF AGRICULTURE

\$ 40.00 (XXXX) COUPON NO 13 (XXXX) \$ 40.00  
**WASHINGTON STEEL & BOLT COMPANY.**  
 EDMONDS WASH  
 WILL PAY TO THE BEARER ON THE FIRST DAY OF **MARCH, 1915**  
 AT THE OFFICE OF THE **WASHINGTON TRUST COMPANY** IN THE CITY OF SPOKANE,  
 COUNTY OF SPOKANE, STATE OF WASHINGTON, **FORTY DOLLARS**  
 IN GOLD COIN OF THE UNITED STATES OF AMERICA, BEING SIX (6) MONTHS INTEREST  
 DUE ON THAT DATE ON ITS FIRST MORTGAGE GOLD BOND. *A S Pike*  
 202  
 TREASURER

\$ 40.00 (X) COUPON NO 3 (X) \$ 40.00  
**WASHINGTON STEEL & BOLT COMPANY.**  
 EDMONDS WASH  
 YOU PAY TO THE BEARER ON THE FIRST DAY OF **MARCH, 1910**  
 AT THE OFFICE OF THE **WASHINGTON TRUST COMPANY** IN THE CITY OF SPOKANE,  
 COUNTY OF SPOKANE, STATE OF WASHINGTON **FORTY DOLLARS**  
 IN GOLD COIN OF THE UNITED STATES OF AMERICA, BEING SIX (6) MONTHS INTEREST  
 DUE ON THE DATE OF ITS FIRST MORTGAGE GOLD BOND. *U B P. K.*  
 702

\$ 40.00 (XXX) COUPON No 12 (XXX) \$ 40.00

**WASHINGTON STEEL & BOLT COMPANY.**

EDMONDS, WASH

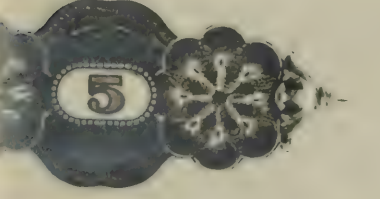
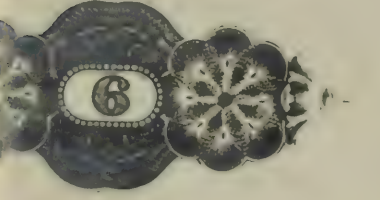
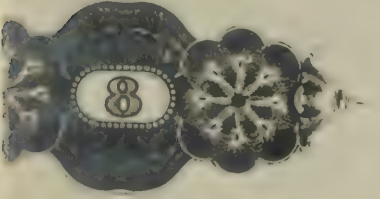
Will pay to the BEARER on the FIRST DAY of **SEPTEMBER, 1914**  
at the OFFICE of the **WASHINGTON TRUST COMPANY** in the CITY of SPOKANE,  
COUNTY of SPOKANE, STATE of WASHINGTON, **FORTY DOLLARS**  
in GOLD COIN of the UNITED STATES of AMERICA, BEING SIX (6) MONTHS INTEREST  
ONE ON THIS DATE ON ITS FIRST MORTGAGE GOLD BOND.

Paid No. **202** *AB PRO*

MADE IN U.S.A.

\$40.00 (X) COUPON No 11 (X) \$40.00  
 WASHINGTON STEEL & BOLT COMPANY.  
 EDMONDS WASH  
 PAY TO THE BEARER ON THE FIRST DAY OF MARCH, 1914  
 AT THE OFFICE OF THE WASHINGTON TRUST COMPANY IN THE CITY OF SPokane,  
 COUNTY OF SPOKANE, STATE OF WASHINGTON, FORTY DOLLARS.  
 IN GOLD COIN OF THE UNITED STATES OF AMERICA, BEING SIX (6) MONTHS INTEREST  
 DUE ON THIS DATE ON THE FIRST MORTGAGE GOLD BOND.  
 A.B. Peto  
 President





**[Petitioner's Exhibit No. 27—Minutes of Meeting of  
Directors of Washington Steel & Bolt Co., Dated  
September 1, 1908.]**

Edmonds, Washington, Sept. 1, 1908.

Pursuant to notice duly given, a meeting of the directors of the Washington Steel & Bolt Company was held at the office of the company at Edmonds, Washington, on said first day of September, 1908. The meeting was called to order by the president, A. McPhaden and roll call being taken it was found that the following Trustees were present. A. McPhaden, A. G. Pike, A. M. Yost and

The minutes of the previous meeting were read and on motion of A. M. Yost, duly seconded, the same were adopted and approved unanimously.

On motion of A. G. Pike, seconded by A. M. Yost, duly carried, the following resolutions were unanimously adopted, to-wit:

Be it now resolved, that whereas, at a meeting of the Trustees of the Washington Steel & Bolt Company held on the 13th day of June, 1908, at its office in Edmonds, Washington, did then and there by the power and authority in them vested by its articles of incorporation and by-laws, and the laws of the State of Washington resolved, authorized and determined to make and issue its first mortgage eight per cent gold bonds to an amount not exceeding \$200,000.00 and to secure the due payment of the principal and interest thereon, by executing and delivering to a suitable trustee a first mortgage or deed of trust upon the entire property and privileges of



said Washington Steel & Bolt Company. Seventy-five thousand (\$75,000.00) Dollars of said bonds to be issued and placed on the market on the execution and delivery *fo* said mortgage and \$125,000 of said bonds to be issued and put on the market only in the event and at such time in the future as the Trustees *maydeem* to be for the best interests of said company. Now, therefore, in pursuance of said resolutions, acts and proceedings at said meeting as aforesaid, it is now hereby further resolved that said bonds be issued in all respects as in said resolutions and proceedings set out, and The Washington Trust Company of Spokane, be and it is hereby selected, nominated and appointed Trustee of said Washington Steel & Bolt Company as by said resolutions contemplated, and the President and Secretary of the Board of Trustees of said Washington Steel & Bolt Company be and they are hereby directed and required to execute and deliver to said The Washington Trust Company as Trustee, a first mortgage or deed of trust upon all and entire the property and privileges of said Washington Steel & Bolt Company for the uses and purposes set forth in said resolutions and said mortgage or deed or trust.

On motion of A. M. Yost, seconded by A. G. Pike, and duly carried, the Washington Steel and Bolt Company withdraws from the market 400,000 shares of its unsold treasury stock, until such time in the future as the company may see fit and proper to issue and place the same on the market.

On motion of A. M. Yost, seconded by A. G. Pike, and duly carried, a commission of five per cent of the

face value of the bonds of said company be allowed to any agent, officer or Trustee of the company purchasing or selling any of said bonds of said company. The company to furnish all literature, such as prospectuses, etc.

On motion of A. G. Pike, seconded by A. M. Yost, duly carried, the bill of The Washington Trust Company of Four Hundred and Seventy-five (\$475.00) Dollars for its services in acting as Trustee for said Washington Steel & Bolt Company in the registering and all other work of every nature or kind performed or to be performed by said Trustee, connected with said bonds, which said bill also includes all charges made by its attorney in the examining and passing upon said mortgage or trust deed.

On motion of A. M. Yost, seconded by A. G. Pike duly carried, the accounts of A. McPhaden and A. G. Pike for money loaned to the Washington Steel & Bolt Company to date be settled by giving them bonds of the Washington Steel & Bolt Company, allowing them a discount of five per cent on said bonds, and a commission of five per cent for selling the same and authorizing the Trustee to issue to them bonds of said company in proportion to the amount of the claims due each, as shown by the books of the company.

John Barkely having at this time, in writing, tendered his resignation as Vice-president of the Company, same being accepted, Wales R. Ammon was on motion duly made and carried, elected Vice-President of the company in place of and stead of said Barkely resigned.



There being no further business to come before the meeting, said meeting on motion duly made and carried was adjourned.

A. M. McPHADEN,  
President.

Attest: A. G. PIKE,  
Secretary.

This Is To Certify, that we, Alexander McPhaden, A. G. Pike, A. M. Yost and ————— of the undersigned trustees hereby state that we were present at the Trustees meeting of the Washington Steel & Bolt Company held Sept. 1, 1908 at its office in Edmonds, Washington, and took part in all the proceedings; that the above minutes of said meeting fully set forth the proceedings of said meeting, all of which we hereby approve of.

We, J. W. Cosford and Austin Ready hereby certify that we have carefully read the minutes of the Trustees meeting of the Washington Steel and Bolt Company held on the first day of September, 1908, as hereinabove set forth, and hereby fully approve of the same.

W. R. AMMON, Vice President,  
A. G. PIKE, Sec. and Treas.

Subscribed and sworn before me this 7th day of December, A. D. 1908.

[Seal] TOPHAR HOWELL,  
Notary Public in and for the State of Washington,  
Residing at Edmonds.

[Endorsed]: "Petitioner's Exhibit 27." Dora Beach. No. 2512. U. S. Circuit Court of Appeals

for the Ninth Circuit. Petitioner's Exhibit 27. Received Jan. 5, 1915. F. D. Monckton, Clerk.

**[Petitioner's Exhibit No. 28—Certificate of Secretary and Treasurer of Washington Steel & Bolt Co. Re Account of A. G. Pike.]**

**WASHINGTON STEEL & BOLT CO.**

**EDMONDS, WASH., —————.**

To The Washington Trust Co.;—

This is to certify, that according to the books of the Washington Steel & Bolt Co., A. G. Pike, up to the first day of September, 1908, has a credit of \$2,693.85, and that according to a resolution passed by the Trustees of the said Washington Steel & Bolt Co., on the first day of September, 1908, said A. G. Pike is to be paid in the bonds of said company, allowing the agent's commission of five per cent, and the discount of five per cent; which said discount and commission would give him a credit of \$2,963.23, and you are authorized and instructed to issue to said A. G. Pike four (4) bonds of the denomination of \$500.00 each, and nine (9) bonds of \$100.00 each, making a total cash value of \$2,900.00, and leaving him a credit balance of \$63.23 on the books of said company.

Dated this first day of September, 1908.

**WASHINGTON STEEL & BOLT CO.**

(Signed) By A. S. PIKE,

Secretary and Treasurer.

(Signed) H. R. BEESON,

Accountant.



[Endorsed]: "Petitioner's Exhibit 28." Dora Beach. No. 2512. U. S. Circuit Court of Appeals for the Ninth Circuit. Petitioner's Exhibit 28. Received Jan. 5, 1915. F. D. Monckton, Clerk.

**[Petitioner's Exhibit No. 29—Certificate of Secretary and Treasurer of Washington Steel & Bolt Co. Re Account of A. McPhaden, Up to September 1, 1908.]**

**WASHINGTON STEEL & BOLT COMPANY.**

**EDMONDS, WASH.,** —————

To The Washington Trust Company:

This is to certify, that according to the books of the Washington Steel & Bolt Company, A. McPhaden up to the first day of September, 1908 has a credit of \$21,128.80, and that according to a resolution passed by the trustees of the said Washington Steel & Bolt Company on the first day of September, 1908, said A. McPhaden is to be paid in the bonds of said company, allowing the agent's commission of five per cent, and the discount of five per cent; which said discount and commission would give him a credit of \$23,241.68, and on payment to you of \$58.32 in cash, you are authorized and instructed to issue to said A. McPhaden 20 bonds of denomination of \$1,000 each, six bonds of \$500. each, and 3 bonds of \$100 each, making a total cash value of \$23,300.

Dated this first day of September, 1908.

**WASHINGTON STEEL & BOLT COMPANY.**

(Signed) By A. G. PIKE,

Secretary and treasurer.

[Endorsed]: "Petitioner's Exhibit 29." Dora Beach. No. 2512. U. S. Circuit Court of Appeals for the Ninth Circuit. Petitioner's Exhibit 29. Received Jan. 5, 1915. F. D. Monckton, Clerk.

**[Petitioner's Exhibit No. 30—Certificate of Treasurer and Manager of Washington Steel & Bolt Co. Re Account of A. McPhaden, Up to December 28, 1908.]**

WASHINGTON STEEL & BOLT CO.

EDMONDS, WASH., Dec. 28, 1908.

To The Washington Trust Co.;—

This is to certify, that according to the books of the Washington Steel & Bolt Co., A. McPhaden, up to the Twenty-eighth day of December, 1908, has a credit of \$3,707.18, and that according to a resolution passed by the Trustees of the said Washington Steel & Bolt Co., on the first day of September, 1908, said A. McPhaden is to be paid in the bonds of said company; and you are authorized and instructed to issue to said A. McPhaden six (6) bonds of the denomination of \$500.00 each, and seven (7) bonds of \$100.00 each, making a total cash value of \$3,700.00.

Dated this twenty-eighth day of December, 1908.

THE WASHINGTON STEEL AND BOLT CO.,

(Signed) By A. G. PIKE,

Treasurer & Mgr.,

(Signed) H. R. BEESON,

Sec'y.

[Endorsed]: "Petitioner's Exhibit 30." Dora Beach. No. 2512. U. S. Circuit Court of Appeals



for the Ninth Circuit. Petitioner's Exhibit 30. Received Jan. 5, 1915. F. D. Monckton, Clerk.

**[Petitioner's Exhibit No. 31—Minutes of Meeting of Trustees of Washington Steel & Bolt Co., April 30, 1909.]**

Edmonds, Wn.,

April 30th, 1909.

Pursuant to notice given by the Secretary, a special meeting of the Trustees of the Washington Steel & Bolt Company was held at the office of the Company at Edmonds, Wash., on the thirtieth day of April, 1909. The meeting was called to order by the President A. McPhaden, and roll call being taken, it was found that the following Trustees were present; A. McPhaden, A. G. Pike, W. R. Ammon, H. W. Hall, and H. R. Beeson.

The minutes of the previous meeting were read and on motion of H. W. Hall, duly seconded, the same were approved and adopted.

On motion of A. G. Pike, seconded by W. R. Ammon, and duly carried, it was decided that the Bank of Montreal be made a depository for the Company's funds and that all banking business be transferred from the State Bank of Edmonds to said Bank of Montreal.

On motion of A. G. Pike, seconded by W. R. Ammon, and duly carried, the President and Treasurer were authorized to negotiate loans from time to time as they deemed necessary to further the interests of the Company.

On motion of A. G. Pike, seconded by W. R. Ammon, and duly carried, the Secretary was in-

structed to notify the Washington Trust Company to deliver to A. McPhaden, bonds of the Washington Steel & Bolt Company to the amount of \$20,000.00 or any part thereof, upon presentation of said A. McPhaden's note to the amount of the bonds delivered, less five per cent of the face value of the bonds and five per cent commission; said note to draw eight per cent interest, payable on date when interest on Bonds fall due.

There being no further business to come before the meeting, said meeting, on motion duly *amde* and carried, was adjourned.

(Signed) A. McPHADEN,  
Pres.

(Signed) W. R. AMMON,  
Vice-Pres.

(Signed) A. G. PIKE,  
Mgr. & Treas.

(Signed) H. R. BEESON,  
Sec'y.

(Signed) H. W. HALL,  
Trustee.

[Endorsed]: "Petitioner's Exhibit 31." Dora Beach. No. 2512. U. S. Circuit Court of Appeals for the Ninth Circuit. Petitioner's Exhibit 31. Received Jan. 5, 1915. F. D. Monckton, Clerk.



**[Petitioner's Exhibit No. 32—Letter, May 3, 1909,  
Washington Steel and Bolt Co. to A. McPhaden.]**

**WASHINGTON STEEL & BOLT CO.**

**EDMONDS, WASH., May 3, 1909.**

Mr. A. McPhaden

Spokane, Wn.

Dear Sir;—

In reply to your favor of the first, you will please find enclosed copy of minutes of Director's meeting held April 30, 1909. In the past Washington Trust Co. has required minutes properly signed which authorized any action on their part and we take this means of getting quick action on your deal. I don't think you will have to do anything except sign your name to the minutes and present them to the Trust Co., Writing them a letter without sending the minutes might only cause delay.

Yours very truly,

**THE WASHINGTON STEEL AND BOLT CO.,**

(Signed) **H. R. BEESON.**

[Endorsed]: "Petitioner's Exhibit 32." Dora Beach. No. 2512. U. S. Circuit Court of Appeals for the Ninth Circuit. Petitioner's Exhibit 32. Received Jan. 5, 1915. F. D. Monckton, Clerk.

**[Petitioner's Exhibit No. 33—Minutes of Meeting  
of Board of Trustees of Washington Steel & Bolt  
Co., June 29, 1909.]**

Edmonds, Wash.,

June 29, 1909.

**TRUSTEE'S MEETING.**

Pursuant to due notice given by the Secretary, a

special meeting of the Board of Trustees of the Washington Steel & Bolt Co. was held on the twenty-ninth day of June, 1909, at the office of the company, Edmonds, Wash. Meeting was called to order by the Vice-President, W. R. Ammon, at 10:30 A. M., at which said meeting there were present the following trustees,—viz: W. R. Ammon, A. G. Pike, G. W. Hall, and H. R. Beeson.

Minutes of the previous meeting read, and on motion duly carried, same were approved and adopted.

On motion of A. G. Pike, seconded by H. W. Hall, and duly carried, the following resolutions were unanimously adopted:

BE IT RESOLVED, that the bond trustees, (the Washington Trust Co.), be authorized to pay to parties purchasing bonds of this company the interest accrued on said bonds from the immediately preceeding interest paying date.

BE IT FURTHER RESOLVED that the Washington Trust Co. be instructed to accept the return of all, or any part of the bonds, issued to A. McPhaden on the authority of the Board of Trustees in meeting held April 30th, 1909. And that they be further instructed to return to said A. McPhaden his notes to the amount of bonds returned.

There being no further business to come before the meeting, said meeting, on motion duly made and carried, was adjourned.

A. G. PIKE.

H. R. BEESON.

W. R. AMMON.

H. W. HALL.



10/28/09

Bonds 705-9-10-11-13-15-21-23 amounting to \$8000.00 and note for \$1800.00 covering bonds 704 and 722 received in exchange for \$9000.00 in notes dated May 11, 1909 as per instructions above.

M. E. HOWES.

[Endorsed]: "Petitioner's Exhibit 33." Dora Beach. No. 2512. U. S. Circuit Court of Appeals for the Ninth Circuit. Petitioner's Exhibit 33. Received Jan. 5, 1915. F. D. Monckton, Clerk.

**[Petitioner's Exhibit No. 34—Letter November 11, 1909, Washington Steel & Bolt Co. to Washington Trust Co.]**

WASHINGTON STEEL & BOLT CO.

EDMONDS, WASH., Nov. 11, 1909.

Washington Trust Co.,

Spokane, Wash.,

Gentlemen;—

We enclose herewith statement of Mr. McPhaden's account as shown by the books of the Company Nov. 1st, 1909. As per Director's meeting of Sept. 1st, 1908, copy of minutes of which you hold in your possession, he desires to partially cover his account with bonds. You now hold his notes for \$4050.00 to cover bonds to the amount of \$4500.00 which you issued to him some time since. Kindly issue the remaining \$1500.00 of bonds (two \$500.00 and five \$100.00 bonds) and send same to Mr. McPhaden c/o this Company at Edmonds, Wash., also return his notes for \$4,050.00.

Thanking you in advance for this favor, we beg to remain,

Yours very truly,

THE WASHINGTON STEEL & BOLT CO.,

(Signed) By H. R. Beeson,

Secy.

[Endorsed]: "Petitioner's Exhibit 34." Dora Beach. No. 2512. U. S. Circuit Court of Appeals for the Ninth Circuit. Petitioner's Exhibit 34. Received Jan. 5, 1915. F. D. Monckton, Clerk.

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**[Petitioner's Exhibit No. 35—Letter, February 19, '10—Washington Steel & Bolt Co. to Washington Trust Co.]**

WASHINGTON STEEL & BOLT CO.

EDMONDS, WASH., Feb. 19th, '10.

Washington Trust Co.,

Spokane, Wash.,

Gentlemen;

We herewith enclose statement of Mr. McPhaden's account as shown by the books of the Company on the 19th of Feb. 1910. As per Directors Meeting of Sept 1st, 1908, copy of minutes of which you hold in your possession, he desires to partially cover his account with bonds.

Kindly issue one \$500.00 and five \$100.00 bonds making a total of One Thousand Dollars, and send same to Mr. McPhaden c/o of this Company at Edmonds, Wash.



Thanking you in advance for this favor, we beg to remain,

Yours very truly,

WASHINGTON STEEL & BOLT CO.,

(Signed) By W. A. KELLY,

Secy.

[Endorsed]: "Petitioner's Exhibit 35." Dora Beach. No. 2512. U. S. Circuit Court of Appeals for the Ninth Circuit. Petitioner's Exhibit 35. Received Jan. 5, 1915. F. D. Monckton, Clerk.

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[Petitioner's Exhibit No. 36—Letter, February 19, '10—Washington Steel & Bolt Co. to Washington Trust Co.]

WASHINGTON STEEL & BOLT CO.

Edmonds, Wash., Feb. 19th, '10.

Washington Trust Co.,

Spokane, Wash.,

Gentlemen;

Mr. McPhaden's account today shows a credit of \$2,404.74, as our books will show.

Yours truly,

WASHINGTON STEEL & BOLT CO.,

(Signed) By \_\_\_\_\_,

Secy.

[Endorsed]: "Petitioner's Exhibit 36." Dora Beach. No. 2512. U. S. Circuit Court of Appeals for the Ninth Circuit. Petitioner's Exhibit 36. Received Jan. 5, 1915. F. D. Monckton, Clerk.

**[Petitioner's Exhibit No. 37—Minutes of Meeting  
of Board of Directors of Washington Steel & Bolt  
Co., March 20, 1911.]**

Edmonds, Wash., March 20th, 1911.

Meeting of the Board of Directors,

Washington Steel & Bolt Co.

Pursuant to notice given March 16th, 1911.

Meeting called to order by Vice President.

The following Directors were present,

W. R. Ammon, H. W. Hall, A. G. Pike,

Minutes previous meeting read and approved.

Motion made by A. G. Pike seconded by R. W. Hall that \$25,000 of the Company's unsold bonds be placed with the Bank of Montreal as Collateral on a \$20,000.00 loan that this Company owes, and an order be given the Washington Trust Company to deliver same to the Bank.

Carried.

Motion made by A. G. Pike to send a Copy of these minutes to Dr. J. W. Cosford and Austin Ready for their consideration (they not being present) Seconded by H. W. Hall,

Carried.

There being no further business meeting adjourned.

Signed: A. G. Pike, Sec'y & Treasurer.

W. R. Ammon, Vice-President.

H. W. Hall.

J. W. Cosford, President.

Austin Ready.



[Endorsed]: "Petitioners' Exhibit 37." Dora Beach. No. 2512. U. S. Circuit Court of Appeals for the Ninth Circuit. Petitioners' Exhibit 37. Received Jan. 5, 1915. F. D. Monckton, Clerk.

**[Petitioner's Exhibit No. 38—Letter, Apr. 15, 1911, Washington Steel & Bolt Co. to The Washington Trust Co., and Receipt, Apr. 17, 1911, of Bank of Montreal, Spokane, Wash., to Washington Trust Co., etc.]**

Seattle, Wash., April 15, 1911.

The Washington Trust Co.,

Spokane, Wash.

Gentlemen:

Please deliver to the Bank of Montreal, \$25,000 of our company's bonds as per instructions in our letter to you of even date, and oblige,

Yours very truly,

WASHINGTON STEEL & BOLT CO.

By A. G. Pike,

Mgr.

Spokane, Wash.,

17th April, 1911.

Received from the Washington Trust Company \$25,000 bonds of the Washington Steel and Bolt Company referred to above.

For the Bank of Montreal, Spokane, Wash.

C. H. G. Phipps,

Manager.

[Endorsed]: "Petitioner's Exhibit 38." Dora Beach. No. 2512. U. S. Circuit Court of Appeals for the Ninth Circuit. Petitioner's Exhibit 38. Received Jan. 5, 1915. F. D. Monckton, Clerk.

**[Petitioner's Exhibit No. 39—Receipt, Apr. 19, 1911,  
Issued to The Washington Trust Co., etc.]**

Spokane, Wash., April 19, 1911.

Received of The Washington Trust Company bonds in the par value of Twenty-five Thousand (\$25000.00) Dollars issued by the Washington Steel & Bolt Company.

Seventeen (17) bonds each of a par value of One Thousand (\$1000.00) Dollars numbered as follows: 705, 709, 710, 711, 713, 715, 721, 723, 724, 725, 726, 727, 728, 729, 730, 731 and 732, and sixteen (16) bonds each having the par value of Five Hundred (\$500.00) Dollars numbered as follows: 675 to 690 both inclusive.

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W-H

[Endorsed]: "Petitioner's Exhibit 39." Dora Beach. No. 2512. U. S. Circuit Court of Appeals for the Ninth Circuit. Petitioner's Exhibit 39. Received Jan. 5, 1915. F. D. Monckton, Clerk.

**[Claimants' Exhibit No. 2—First Mortgage or Deed  
of Trust of Washington Steel & Bolt Company  
to The Washington Trust Co.]**

133386

**FIRST MORTGAGE OR DEED OF TRUST.**

Washington Steel & Bolt Company,

to

The Washington Trust Company.

THIS INDENURE, made and entered into this 1st day of September, A. D. 1908, by and between the WASHINGTON STEEL & BOLT COMPANY, a



private corporation organized and existing under and by the laws of the State of Washington, with its principal place of business at Edmonds, County of Snohomish, State of Washington, hereinafter called WASHINGTON STEEL & BOLT COMPANY, party of the first part, and THE WASHINGTON TRUST COMPANY a corporation organized and existing under the laws of the State of Washington, with its principal place of business at Spokane, County of Spokane, State of Washington, hereinafter called the TRUSTEE, party of the second part, WITNESSETH:—

THAT WHEREAS, the objects of said Washington Steel & Bolt Company as stated in its articles of incorporation and by laws and as authorized by the laws of the State of Washington, are as follows, to wit—

The objects and purposes for which this corporation is formed are to purchase, own, hold, manufacture, sell, vend and dispose of the patented inventions, rail joints and improvements and make improvements thereon. To grant the right to manufacture, vend, sell, and use the same in whole or in part, in the whole or in any part of the United States, or any State or any part thereof, for a total sum or upon the payment of a royalty. To build, construct and operate factories and transact a general manufacturing business. To purchase, own, hold real estate and personal property. To build, construct, equip and operate steam and electric railroads, and transact a general common carrier business for hire. To enter into contracts for the building, construct-

ing and operating railroads, manufacturing railroads rails, ties and railroad equipments. To borrow money on the credit of the company, issue bonds and to mortgage, hypothecate or pledge any and all of its property to secure the same. To sign bonds for the faithful performance of its contracts. To contract concerning its lands, mills, factories and articles by it manufactured, including railroad rails, and products of all kinds; to sell and deal in electric power, and do all and every act necessary, expedient or proper or incidental to any business herein enumerated. And the company to purchase, own, hold, manufacture, sell, vend and dispose of the United State Patent #740257 of the Owen-Shaw Nut and Bolt Locks, make improvements therein and thereon. To purchase, own, hold, manufacture, sell, vend and dispose of any other patent or patents in whole or in part, in the whole or in any part of the United States, or in any state or in any part thereof, in any county or any part thereof, for a total sum or on a payment of a royalty. To enter into contracts for the making and manufacturing of any articles or things for which it holds a patent or any part thereof. To enter into contracts for building, constructing and operating railroads, manufacturing railroad joints, safety nut and bolt locks, ties and railroad equipments. To contract concerning its land, mills, factories and articles by it manufactured, owned or dealt in. And,

WHEREAS, the said Washington Steel & Bolt Company being authorized by its articles of incorporation, its by-laws and by the laws of the State of Washington, among other things as above stated



to buy and sell, mortgage and hypothecate real and personal property, erect and maintain buildings and factories with all necessary machinery and implements of every nature or kind, for the purpose of manufacturing railroad joints, safety nut and bolt locks, ties and railroad equipments and all kinds of bolts and articles of that nature, including the manufacturing of rod iron of all kinds, and,

WHEREAS, the said Washington Steel & Bolt Company has now in active operation a factory manufacturing bolts of all kinds, located at Edmonds, Snohomish County, Washington, and,

WHEREAS, its present machinery is insufficient to supply the demands made for its manufactured products, and,

WHEREAS, said Washington Steel & Bolt Company deem it not only to its best interests, but imperative in order to supply the demands of the trade made upon its manufactured product to enlarge its building and plant and by adding new and additional machinery and tools, and to purchase and erect a roller mill for the manufacture of bar and rod iron to erect docks, etc., and,

WHEREAS, in order to enlarge said buildings and add said machinery and purchase and erect said roller mill, and build said docks it will be necessary to obtain additional capital, and,

WHEREAS, the Board of Trustees of said Washington Steel & Bolt Company deeming it advisable and to the best interests of said company, and being fully empowered by the by-laws of said Washington Steel & Bolt Company, and acting pursuant thereto,

at a meeting duly held for that purpose, on the date hereof, has resolved and determined that for the purpose of promoting the larger success of said Washington Steel & Bolt Company, that the borrowing of the sum of Two Hundred Thousand (\$200,000) Dollars was necessary and to the best interests of said company as aforesaid, and that such sum should be borrowed for it in its behalf and name, by its officers and by due action of the Trustees of the Washington Steel & Bolt Company at a meeting called and held according to law, has as aforesaid resolved and determined, as aforesaid, to make and issue its first mortgage coupon bonds of the total issue of Two Hundred Thousand (\$200,000) Dollars divided into Five Hundred (500) Bonds of One Hundred (\$100) Dollars each, Two Hundred (200) bonds of Five Hundred (\$500) Dollars each and Fifty (50) bonds of One Thousand (\$1000) Dollars each, all payable at the office of the TRUSTEE in Spokane, Washington, on the 1st day of September, 1918, in gold coin of the United States of the present standard of weight and fineness, bearing interest at the rate of Eight (8%) per centum per annum from the date of issue or sale thereof, payable semi-annually in like gold coin on the first day of March and September, in each and every year thereafter, until said principal is fully paid, according to the tenor of the coupons thereto annexed, without deduction for any tax or taxes that the Washington Steel & Bolt Company may be required to pay or to retain from said principal or interest, by any present or future laws of the United States of America, or of the State of



Washington; said bonds being numbered consecutively from one (1) to and including the number Seven Hundred and Fifty (750).

Each of said bonds to be duly executed under the seal of the Washington Steel & Bolt Company, signed by its President or Vice-President, and attested by its Secretary or Assistant Secretary, and the interest coupons thereto annexed or belonging, to be authenticated by or with the engraved signature of its Treasurer, nevertheless, with the understanding that Seventy-five Thousand (\$75,000) Dollars of said bonds shall be issued and placed on the market on the execution and delivery of this said Indenture, and the balance of One Hundred and twenty-five Thousand (\$125,000) Dollars of said bonds to be held by the TRUSTEE, and not issued and put on the market only in the event and at such time in the future as the Trustees of said Washington Steel & Bolt Company may deem to be for the best interests of said company, and,

WHEREAS, in order to secure the payment of the principal and interest of all the said bonds equal and ratable, without priority or distinction irrespective of the date of the issue of the same, the said Washington Steel & Bolt Company has by due action of its Board of Trustees, as aforesaid, determined to execute and deliver this mortgage or deed of trust; and has further determined that each of said bonds shall be certified by the Trustee, which certificate shall be conclusive proof that the same is secured by this Indenture, and that each of said bonds, coupons and certificate as approved by said Board of Trustees, are as follows, to wit:—

(FORM OF BOND)

UNITED STATES OF AMERICA,  
State of Washington.

#—————

\$—————

WASHINGTON STEELE & BOLT COMPANY  
Edmonds, Washington.

First Mortgage Eight Per Cent Gold Bond:—

KNOW ALL MEN BY THESE PRESENTS:  
That WASHINGTON STEEL & BOLT COMPANY, a corporation duly organized and existing under the laws of the State of Washington, for value received, acknowledges itself indebted to the bearer of this bond, or if this bond be registered to the registered holder thereof in the sum of One Thousand (\$1,000) Dollars (or Five Hundred (\$500) Dollars or One Hundred (\$100) Dollars as the case may be), which it hereby promises and agrees to pay in United States gold coin of the present standard of weight and fineness, on the first day of September, 1918, at the office of The Washington Trust Company, Trustee, in the City of Spokane, County of Spokane, State of Washington, with interest thereon from the date of issue or sale thereof until paid at the rate of eight (8%) per centum per annum payable semi-annually in like gold coin on the first day of March and September in each year on the presentation and surrender of the coupons annexed hereto, as they severally become due; all payments upon this bond, both of the principal and interest shall be made without deduction for any tax or taxes that said Washington Steel & Bolt Company may be required to pay or to retain therefrom by any present or future laws



of the United States of America, or of the State of Washington, said Washington Steel & Bolt Company hereby covenanting and agreeing to pay any and all such tax or taxes.

This bond is one of a series of Seven Hundred and Fifty (750) bonds all of the same tenor and date, numbered consecutively from one (1) to and including the number Seven Hundred and Fifty (750). The first Five Hundred (500) bonds being of the denomination of One Hundred (\$100) Dollars each, and Two Hundred (200) bonds being of the denomination of Five Hundred (\$500) Dollars each and Fifty (50) bonds being of the denomination of One Thousand (\$1,000) Dollars each, and all said bonds with the coupons thereto attached, are equally secured by a first mortgage or deed of trust, duly executed and delivered by the said Washington Steel & Bolt Company to THE WASHINGTON TRUST COMPANY in Spokane, County of Spokane, State of Washington, as Trustee, subject to all the provisions and conditions therein, bearing even date with this bond, authorized by said WASHINGTON STEEL & BOLT COMPANY to be issued to an amount not exceeding in the aggregate the principal sum of Two Hundred Thousand (\$200,000) Dollars, nevertheless, with the understanding that Seventy-five Thousand (\$75,000) Dollars of said bonds shall be issued and placed on the market on the execution and delivery of this said Indenture, and the balance of One Hundred and twenty-five Thousand (\$125,000) Dollars of said bonds to be held by the Trustee, and not issued and put on the market only in the event and at such time

in the future as the Trustees of said Washington Steel & Bolt Company may deem to be for the best interests of said company, and covering and conveying all real property and personal property owned by said WASHINGTON STEEL & BOLT COMPANY, and more particularly described in said mortgage, and to which reference is hereby made for the nature and extent of the security and rights of the holders of these bonds, and the terms and conditions thereof, which is duly recorded in the office of the County Auditor of Snohomish County, State of Washington; in case default shall be made and shall continue for six (6) months in the payment of any interest on any of the bonds secured by this Indenture, the principal of the said bonds with all the interest accrued and unpaid thereon, shall become due and payable at the election and upon declaration of the owners of one-third in amount of said bonds, then, outstanding.

This bond may pass by delivery but may be registered as to the number hereof, upon the transfer book of the TRUSTEE at its office, and after such registration duly certified hereon by the TRUSTEE this bond shall be transferred only on said books, unless transfer be to bearer, when it shall again be transferred by delivery subsequent to registration in like manner. This bond shall not become obligatory until it shall have become authenticated by the certificate of the Trustee endorsed hereon.

No recourse shall be had for the payment of the principal or interest of this bond, against any individual incorporator, stockholder, officer or Trustee



of said Washington Steel & Bolt Company, and any and all liabilities of incorporators, stockholders, trustees and officers of the said Washington Steel & Bolt Company individually being hereby released.

IN WITNESS WHEREOF, the said WASHINGTON STEEL & BOLT COMPANY has caused these presents to be signed and executed in its corporate name by its president, and counter-signed by its Secretary, and its corporate seal hereto affixed, and the coupons for interest being authenticated by the engraved signature of its Treasurer to be attached hereto, this 1 day of September, 1908, all pursuant to legal authority in them vested to that end.

WASHINGTON STEEL & BOLT COMPANY.

By A. McPHADEN,  
President.

Attest: A. G. PIKE,  
Secretary.

Washington Steel and Bolt  
Company, Seal Incorporated  
1906, Edmonds, Wash.

(FORM OF COUPON)

\$———— Coupon No. 1 \$————

WASHINGTON STEEL & BOLT COMPANY,  
Edmonds, Washington, will pay to the bearer on  
the first day of ——— at the office of THE WASH-  
INGTON TRUST COMPANY in the city of Spo-  
kane, County of Spokane, State of Washington,  
———— Dollars in gold coin of the United States of

America, being six (6) months interest due on that date, on its first mortgage gold bond.

Bond No. ———

A. G. Pike,  
Treasurer.

(FORM OF CERTIFICATE)

IT IS HEREBY CERTIFIED that this bond is one of a series of bonds described in a mortgage or deed of trust therein mentioned, executed by the WASHINGTON STEEL & BOLT COMPANY to the undersigned as Trustee, bearing date the first day of September, 1908.

THE WASHINGTON TRUST COMPANY,  
Trustee.

By R. L. Webster,  
Secretary.

NOW, THEREFORE, the WASHINGTON STEEL & BOLT COMPANY in consideration of the promises and of the agreements heretofore and hereinafter made, and of the sum of One (1) Dollar received by the WASHINGTON STEEL & BOLT COMPANY from the Trustee herein, at or before the execution and delivery of this instrument, the receipt whereof is hereby acknowledged, and of money or moneys to be hereafter received by said WASHINGTON STEEL & BOLT COMPANY from the first purchasers of the bonds, so authorized to be issued or of so many of them as shall be issued and sold, and in order to secure the payment of the principal and interest of all such bonds to be issued as hereinbefore provided, and outstanding, to an amount not exceeding in the aggregate of the prin-



incipal thereof at their par value of Two Hundred Thousand (\$200,000) Dollars and all charges and compensations of the Trustee hereunder, and all proper and legal expenses incidental to the administration of its trust, or the enforcement of this mortgage, the WASHINGTON STEEL & BOLT COMPANY has granted, bargained, and sold, transferred, assigned, set over, released, conveyed and confirmed and by this Indenture does grant, bargain and sell, transfer, assign and set over, release, convey and confirm unto THE WASHINGTON TRUST COMPANY, in the City of Spokane, County of Spokane, State of Washington, hereinabove stated as TRUSTEE, and to its successor or successors in the trust hereby created, and its assigns forever, all and singular the following described real property, situate, lying and being in the County of Snohomish, State of Washington, and particularly bounded and described as follows, to wit:—

Beginning at the point of intersection of section line between Sections Twenty-three (23) and Twenty-six (26), Township Twenty-seven (27) North, Range Three (3) East of W. M., with the center line of the Great Northern Railroad right of way; thence angle west to South 48 degrees 46 minutes (magnetic course south 40 degrees 56 minutes west), along the center line of the Great Northern right of way, 339.5 feet; thence angle right 46 degrees 17 minutes a distance of 69.18 feet to the true place of beginning. Thence same course 395.8—Thence angle left 64 degrees 25 minutes 290.58 feet; thence angle left 115 degrees 35 minutes 269.72 feet;

thence angle left 46 degrees 17 minutes 362.5 feet to the place of beginning, containing 2.004 acres, also all the abutting tide lands in front of the above described premises amounting to about six (6) acres or about eight (8) acres in all, and any other real estate that may be hereafter acquired by said WASHINGTON STEEL & BOLT COMPANY together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, all buildings, permanent fixtures or mechanical constructions, and all machinery now incorporated into the real estate, or any other building, fixtures or machinery hereafter secured by the said WASHINGTON STEEL & BOLT COMPANY, and placed upon said above-described real estate, or any real estate hereafter acquired by said Washington Steel & Bolt Company, and all riparian or other rights connected therewith. And upon the same considerations, said Washington Steel & Bolt Company hereby sells, transfers and assigns to said TRUSTEE, and its successors in trust, the personal property of said WASHINGTON STEEL & BOLT COMPANY, all being situate in or used with said company's plant and bolt factory or shops and any other buildings now situate, and being upon the above-described land, or hereafter at any time during the life of this mortgage, that may be placed upon said above-described land or premises, and particularly known as the WASHINGTON STEEL & BOLT COMPANY'S factory and plant, to wit:



One *Agax* hot pressed nut machine 16 ton.

One Acme nut tapper 2,

One Acme nut tapper 1.

One Alligator Shear.

One Acme heading and forging machine 1.

One Acme heading and forging machine 2.

One Acme threading machine 2.

One Acme threading machine 1.

One Acme pointing machine.

One 70 h. p. boiler Erie City manufacture.

One 60 H. P. Engine.

\$6000 worth of dies, in die houses on above-described real estate.

One burring machine, water works, hose, electric lights, plant. A complete oil pumping station with heaters, double strainer, together with pipings and Rockwell oil burners for boiler, and also one three ton tumbler. Blacksmithing outfit such as vices, anvils, emery stands, tongs, hammers, drills, punches, etc. All leather endless belting, and any other belting owned and used by said Washington Steel & Bolt Company in and about its said bolt factory. All pulleys owned by said Washington Steel & Bolt Company used in and about said bolt plant, all of the same being of steel material. All roller bearings for shaftings 120 feet or more long. All office furniture and fixtures among other things including desk, filing cabinet, typewriter, steam heating apparatus, situate and being in the office of said company, which said office building is now located upon the above-described real estate.

Two hot blast furnaces. One oil tank, capacity

500 barrels. Platform scales. Also one United States patent known as the Climo Rail Joint Patent #755848, issued on the 29th of March, 1904, together with all rights and privileges thereto connected or in anywise belonging also one United States Patent #740257, known as the Owen-Shaw nut and Bolt Locks, together with all rights and privileges thereto belonging.

IT IS SPECIALLY DECLARED to be the intent and meaning hereof, that this instrument shall embrace and cover all real and personal property, including all lease-hold rights hereafter acquired, and all inventions, patents, patented rights, licenses and franchises of every kind, and any and all other property of every nature, kind, and description now owned or hereafter acquired by the said Washington Steel & Bolt Company, wheresoever situated, nevertheless, provided that the said WASHINGTON STEEL & BOLT COMPANY shall have the right to sell in the usual course of trade the stock and manufactured products of said Washington Steel & Bolt Company, freed from any lien under this mortgage or deed, but in case of foreclosure of this mortgage, any and all remaining unsold at that time shall be subject to the lien and condition of this mortgage.

TO HAVE AND TO HOLD said real property and said personal property hereinabove mentioned or acquired as aforesaid, with all their appurtenances, unto the TRUSTEE, and its successor or successors, forever in trust, nevertheless, under the provisions hereof for the equal pro rata benefit and



security of all and every the person or persons, or corporation or corporations, who or which may be or become holders of any of the said bonds, hereby secured, without any preference or priority of one bond over another or others, by reason of priority in time of the issue or negotiation thereof or otherwise, and for the uses and purposes in this bond expressed, and to secure the payment of principal and interest of all such bonds, or of all those outstanding, at any time during the life of this mortgage or deed of trust; provided, however, that if the said WASHINGTON STEEL & BOLT COMPANY, Mortgagor, shall pay the principal and interest of all such bonds, according to their terms and cause the same to be retired and cancelled, and shall pay the reasonable compensation and lawful charges of the Trustee, all that the TRUSTEE shall do or lawfully cause to be done under this Indenture, either in the discharge of its obligations, or the enforcement of its security, thereupon all the estate and interest of the TRUSTEE and any part of said property and all liens thereon, by reason of this indenture shall cease and the said Washington Steel & Bolt Company shall be entitled to a due satisfaction of record thereof.

The Washington Steel & Bolt Company for itself, its successors and assigns, covenants and agrees to and with the TRUSTEE, and its successors in trust, for the benefit of said holders of said bonds, at the time of ensealing and delivery of this Indenture, that it is the true, lawful and rightful owner of all the said real property and personal property herein-

before described, and it is seized of a good, sure, perfect and indefeasible estate of inheritance, in fee simple in said real estate, and of absolute ownership of said personalty; that it has good right, full powers and lawful authority to mortgage, convey, sell or transfer any and all said property to the TRUSTEE in the manner and form aforesaid; that all said property is free and clear of all taxes, liens or encumbrances whatsoever, and that this instrument is the first mortgage, and carries a valid first lien upon all of said real estate, and all of said personal property; and that said Washington Steel & Bolt Company will ever warrant and defend the same to the TRUSTEE, its successor or successors and assigns for the benefit and behoof, and ratable and equal benefit of all bondholders during the life of this Indenture, against all demands whatsoever; that it will keep the buildings and other improvements on said premises in as good condition as the same are now, and not permit or allow waste upon said premises, and will keep the same free and clear of all taxes, liens or incumbrances which might effect or impair the security of the bond holders, under this Indenture; and that at any time hereafter on demand by the Trustee, it will execute and deliver such further assurances and instruments of title by way of security as shall be necessary to correct any imperfection, which may now exist in the lien created by this Indenture, or to pass by way of security any other acquired title, or interest which the Washington Steel & Bolt Company may hereafter acquire in perfection or en-



hancement of its own present title, or any additional real or personal property, which may hereafter be acquired or constructed by the Washington Steel & Bolt Company, and that such further assurance and such conveyance of such other acquired property shall be for the purpose of *affectuating* and confirming the clause of this Indenture purporting to operate upon other acquired property, and in order to extend over the same the lien of this Indenture.

IT IS HEREBY MUTUALLY COVENANTED and agreed, by and between the parties hereto, the Washington Steel & Bolt Company covenanting as well for itself as for its successors and assigns, and the TRUSTEE covenanting as well for itself as for its successor or successors in the trust, that the above-described real and personal property, rights and privileges thereto connected, shall be held by the TRUSTEE upon and for the Trusts, uses and purposes heretofore and hereinafter stated, and that the following shall also be terms and conditions under which said bonds are to be issued by said Washington Steel & Bolt Company, as follows, that is to say:

#### ARTICLE I.

The said Washington Steel & Bolt Company hereby covenants and agrees to pay to the lawful holder of each and every of the bonds, to be issued under and secured by this Indenture, the principal thereof and the interest thereon in accordance with the tenor of said bonds, and of the coupons thereto annexed or belonging thereto, and when and as the same shall respectively become due, and payable

without deduction for any tax or taxes, that it may be required to pay, or to retain from said principal or interest, by any present or future laws of the United States of America or of the State of Washington, and further covenants and agrees to pay all and every the lawful taxes, assessments and charges of every kind, which may at any time be levied, assessed or laid upon the said property of the Washington Steel & Bolt Company, rights and privileges hereby conveyed and every part thereof, when and as necessary to protect the same against the lien of such taxes, assessments and charges, and to do all and everything which may be necessary, advisable or proper to continue and preserve intact, the priority of the lien hereby created, or intended to be created, upon all of the property of every kind and character, rights and privileges hereby conveyed, or intended to be conveyed over every other lien or encumbrance whatsoever, thereon.

The Washington Steel & Bolt Company further covenants and agrees to and does hereby waive the benefit of any extension, stay, appraisement or redemption laws, now existing or that may hereafter exist of the United States of America, or of the State of Washington; and further covenants and agrees at all times diligently to preserve all the rights and privileges now possessed by it, and which may hereafter be granted to or conferred upon it, and at all times to do everything that may be necessary to preserve, maintain or renew its corporate existence and organization, and at all times to preserve and maintain the said Washington



Steel & Bolt Company's property, plant or plants hereby conveyed or hereafter acquired and every part thereof, in good repair, working order and condition, and to supply all necessary machinery, tools, stock equipment, appliances and buildings and from time to time to make all needful and proper repairs, renewals, replacements, useful and proper alterations, additions, betterments and improvements to the end that the value of the security for the bonds to be issued under this Indenture shall never become lessened or impaired.

## ARTICLE II.

The WASHINGTON STEEL & BOLT COMPANY so long as it keeps the covenants and agreements contained in this Indenture, and there is no default in the payment of the principal or interest of any of the bonds or coupons secured by this Indenture, shall have the possession, management use and control of all said property hereinabove described or that may be hereafter acquired by it, and receive the rents, incomes and profits thereof, as if this Indenture had not been made.

## ARTICLE III.

In case default shall be made in the payment of the interest or any of the bonds issued under this Indenture, according to the tenor of the coupons annexed or belonging thereto, or to pay the taxes assessed upon said property when due, or in the performance of any other act, promise, stipulation, covenant or agreement herein contained to be done, performed or kept by the Washington Steel & Bolt Company, and if such default shall continue as here-

inafter in Article V of this Indenture defined, then in every such case, the TRUSTEE may either personally or by its attorney or agent enter into and upon all and singular the Washington Steel & Bolt Company's property, plant or plants, wharf or wharves, rights and privileges hereby conveyed, and each and every part thereof, and wholly exclude the said Washington Steel & Bolt Company, and its agents therefrom, and have, hold, use and enjoy the same as the Washington Steel & Bolt Company could or might have done if this Indenture had not been made, and operate by its managers, superintendents, receivers or servants or other attorneys or agents, the said Washington Steel & Bolt Company's property, plant or plants, wharf or wharves covered or intended to be covered by this Indenture, and continue the business thereof, and exercise the rights and privileges and authorities pertaining thereto, now enjoyed by said Washington Steel & Bolt Company, and make from time to time all needful repairs, replacements and such useful alterations, additions and improvements thereon, and thereto, as may seem to it necessary or judicious, and collect and repay all tolls, freights, incomes, rents, issues and profits of the same, and of every part thereof; and after deducting the expense of operating the said Washington Steel & Bolt Company's factory, wharf, plant or plants, and of conducting the business thereof, and of all the said repairs, replacements, alterations, additions and improvements and all payments which may have been made for taxes, assessments, charges or liens



prior to the lien of this Indenture upon the said Washington Steel & Bolt Company's factory wharf, plant or plants, or property, or any part thereof, covering or intended to be covered by this Indenture, as well as a just compensation for its own services, the TRUSTEE shall apply the residue of the moneys received as aforesaid to the payment and discharge of the obligations of the said Washington Steel & Bolt Company, in respect to which default shall be made, as aforesaid, or ratably and without preference or priority of one obligation over another. If the residue of the moneys coming into the hands of the TRUSTEE, as aforesaid, shall suffice to discharge the obligations in respect to which such default shall have been made, and if the principal of all the said bonds shall not have become due either by the maturity thereof, according to their tenor, or by the exercise of the election to declare the principal thereof to be due, or if the exercise of such election shall have been revoked and annulled, as hereinafter provided, then the TRUSTEE after the discharge of all such obligations, in respect to which default shall have been made, as aforesaid, shall pay over any surplus moneys that may remain and restore the possession, management and control of all the said factory or factories, wharf or wharves, plant or plants, property, rights and privileges covered or intended to be covered by this Indenture to said Washington Steel & Bolt Company, in the condition in which the same shall then be, subject however, to all the provisions, covenants and conditions of this Indenture which shall

thenceforth have the same force and effect, as if no such default had occurred.

#### ARTICLE IV.

In case default shall be made by the said Washington Steel & Bolt Company, and shall continue as hereinafter in Article V and in this Indenture defined and provided, the Trustee may after default in the payment of the principal herein or any part thereof, or of the interest as the same becomes due, or the payment of the taxes, legally assessed and due upon the property covered by this Indenture, either before or after entry as aforesaid, personally or by its attorney or agents, sell and dispose of all and singular the factory or factories, wharf or wharves, plant or plants, rights and privileges hereby conveyed, and all the estate, right, title and interest of the said Washington Steel & Bolt Company, in and to the same as an entirety and at public auction to the highest bidder, at such time or place, and upon such notice as may be required by the laws of the State of Washington, in that behalf enacted, or if there be then no laws of said State of binding and controlling force in the premises, in the State of Washington, at such time as it shall appoint, having first given notice of the time and place of such sale by advertisement, published not less than once a week for six (6) successive weeks in one or more newspapers printed or published in Edmonds, Washington, of general circulation in the business communities of said place, and may adjourn the said sale from time to time in its discretion and if so adjourned, make the said sale at the time and place



to which the same may be so adjourned, and make and deliver to the purchaser or purchasers of the said Washington Steel & Bolt Company's factory or factories, wharf or wharves, plant or plants, property, rights and privileges covered or intended to be covered by this Indenture, a good and sufficient deed or deeds thereof, in fee simple, or other good and sufficient instrument of transfer, which sale, made as aforesaid, shall be a perpetual bar both at law and in equity, against the Washington Steel & Bolt Company's factory or factories, wharf or wharves, plant or plants, property, rights and privileges, or any part thereof or any interest therein, by, from, through or under it; and after deducting from the proceeds of such sale just allowances for all expenses thereof, including attorney's and counsel fees, and all other expenses, advances, and liabilities which may have been made, or incurred by it in operating or maintaining the said Washington Steel & Bolt Company's factory or factories, wharf or wharves, plant or plants, property, rights and privileges, or in managing the business thereof, while in possession, and all payments which may have been made by it of taxes or assessments on the said Washington Steel & Bolt Company's factory or factories, wharf or wharves, plant or plants, property, rights and privileges, or any part thereof, as well as a reasonable compensation for its own services, the TRUSTEE shall apply the residue of the moneys arising from such sale to the payment of the principal of the bonds, which shall have been issued under this Indenture,

and shall then be outstanding and unpaid, whether the same shall have previously become due or not, and to the payment of the interest which shall at that time have accrued on said principal and be unpaid, without discrimination or preference of principal over the interest or of the interest over the principal, but ratably to the aggregate amount of such unpaid principal and accrued interest, and if after satisfaction thereof, a surplus of the said proceeds shall remain, the TRUSTEE shall pay over the same to the Washington Steel & Bolt Company, or to such other party or parties as may be entitled thereto.

#### ARTICLE V.

In case default shall be made by the said Washington Steel & Bolt Company in the payment of the semi-annual interest on any of the bonds issued under this Indenture, according to the tenor of the coupons annexed thereto as they severally become due, and if such interest shall remain unpaid or in arrears for a period of six (6) months, and at any time thereafter on demand of payment in writing made at the office of the Washington Steel & Bolt Company in Edmonds, County of Snohomish, State of Washington, by the holder of not less than one-third in amount of the bonds outstanding at the time, or if default shall be made in the payment of any tax lawfully assessed against said property, in respect to any act, promise, stipulation, covenant or agreement herein contained, other than for the payment of the principal and interest of said bonds, on the part of the said Washington Steel &



Bolt Company to be done, kept or performed, and if any such default shall continue for the period of six (6) months after demand for the performance made in writing by the Trustee at the office of the said Washington Steel & Bolt Company in Edmonds, County and State aforesaid, or in case default shall be made in payment of the principal of said bonds, at the maturity thereof, according to their tenor, and so continue in default for a period of six (6) months, or when the same shall have become due by the exercise of the election hereinafter provided for, then and thereupon in every such case it shall be the duty of the TRUSTEE upon a requisition in writing, signed by the holders of not less than one-third in amount of the said bonds, then outstanding, and being furnished as hereinafter provided with adequate security and indemnity against all costs, expenses and liabilities to be by it incurred, to proceed to enforce the rights of the bondholders under this Indenture, either by the exercise of the powers granted by Article III and Article IV of this Indenture, or by suit or suits in equity or at law, in aid of the execution of such powers, or otherwise as the TRUSTEE being advised by counsel shall deem most effectual to enforce such rights, subject, nevertheless, to the powers hereby declared of the majority in amount of the holders of the said bonds that may be then outstanding, in writing, or by a vote at a meeting duly held, to instruct the TRUSTEE to waive any such default; provided, however that no action by the Trustee or by the bondholders waiving default shall extend or be taken

to apply to, or effect any subsequent default, or impair the rights of the Trustee, or of the bondholders, resulting from such subsequent default; it being hereby expressly covenanted, agreed and declared that the right of entry and sale hereinbefore granted are intended to be cumulative remedies, additional to all other remedies allowed by law, and that the same shall not be deemed in any manner whatsoever, to deprive the TRUSTEE or beneficiaries under this Indenture of any legal or equitable remedy by judicial proceedings, consistent with the provisions of this Indenture, and according to the true intent and meaning thereof; provided always, and it is hereby further expressly covenanted, agreed and declared that no holder or holders of any of the bonds secured hereby, shall have the right to institute any suit, action or proceeding in equity or at law, for the foreclosure of this Indenture, or for the execution of the trusts thereof, or for the appointment of a receiver or for any other purpose under this Indenture, without first giving notice in writing to the TRUSTEE of default having occurred and continued, as in this Article prescribed, and requesting the TRUSTEE and affording it a reasonable opportunity to institute such action, suit or proceeding in its own name, or to proceed to exercise the powers hereby granted and also offering to furnish adequate security and indemnity against the costs, expenses and liabilities to be incurred therein or thereby; and such notification, request and offer of indemnity are hereby declared to be conditions precedent to any suit, action or pro-



ceeding by any holder or holders of any of the bonds secured hereby for the foreclosure of, or for the execution of the trusts of this Indenture, or for the appointment of a receiver, or for any other purpose whatsoever under this Indenture.

It is hereby further covenanted, agreed and declared that in case any sale shall be made of the said Washington Steel & Bolt Company's factory or factories, wharf or wharves, plant or plants, property, rights and privileges, covered or intended to be covered by this Indenture, either by the exercise of the powers granted in this Indenture, or pursuant to or under a decree of judgement of a court of competent jurisdiction, the purchaser or purchasers at such sale shall after first paying in enough to cover the costs and expenses of the foreclosure suit and sale, and any unpaid compensation or charges of the TRUSTEE, and such other charges or expenses of the property pending the foreclosure as the court having jurisdiction of the suit, shall require to be paid in cash, shall have the right and shall be entitled in making settlement for, and in payment of the purchase money, to deliver to the TRUSTEE, or in case of a judicial sale to the person or persons legally appointed and qualified to receive the payment of such purchase money, any of the bonds or coupons secured by this Indenture held by such purchaser or purchasers, and to use and apply the same in or towards the payment of such purchase money, reckoning and computing the said bonds and coupons at a sum equal to and not exceeding that which would be payable out of the net proceeds of

such sale, if made for money to the purchaser or purchasers, as the holder or holders of the said bonds or coupons for his or their just share and proportion, in that character, of such net proceeds upon a due accounting, apportionment and distribution thereof.

It is further understood and agreed that as the coupons annexed to said bonds are paid they shall be cancelled and no purchase of any coupon on any advance or lien thereon or any redemption thereof, by or in behalf of the Washington Steel & Bolt Company after the same shall have been detached from the bonds to which they belong, shall keep such coupon alive or preserve their lien upon the mortgaged property.

It is further understood and agreed that in the event the Washington Steel & Bolt Company shall fail to pay any tax or assessment or other charges herein referred to, or shall suffer any lien to attach by such failure, the TRUSTEE may pay and discharge the same. The Washington Steel & Bolt Company shall repay on demand all moneys paid by the TRUSTEE for taxes, assessments or other charges or any lien on said property, and shall pay said TRUSTEE a reasonable compensation for administering the trust created by this Indenture, which compensation shall be Four Hundred and Fifty (\$450.00) Dollars, for the initial entry or registry of the bonds, and all services connected therewith for the receiving and payment of interest, and shall also pay all charges incurred by the TRUSTEE in connection therewith or enforcement of any of its provisions, or of the rights and securities of the bond-



holders hereunder. If the Washington Steel & Bolt Company shall fail to repay any such moneys so advanced, or to pay the compensation and charges, the same shall be paid by the TRUSTEE out of the proceeds of any sale of the mortgaged property, until then such payment and such compensation and charges shall constitute an additional loan secured by this Indenture, in addition to said bonds, bearing interest at eight (8) per cent per annum, and this Indenture shall create a lien upon all of the property herein described as security therefor.

#### ARTICLE VI.

It is hereby further covenanted, agreed and declared that the receipt or receipts of the trustee shall be a sufficient discharge to the purchaser or purchasers at any sale made by the Trustee under and in pursuance of the powers granted by this Indenture, for his or their purchase money and that such purchaser or purchasers, his or their heirs, executors or administrators shall not, after payment thereof, and having such receipt or receipts be liable or required to see to the application of such purchase money for or upon the purposes and trusts of this Indenture, or in any manner whatsoever, be answerable for any loss, misapplication or non-application of the same, or any part thereof, or be obliged to inquire into the necessity, expediency or validity of or for any such sale.

#### ARTICLE VII.

It is hereby covenanted, agreed and declared that at any sale of the property, plant or plants, rights

or privileges hereby conveyed, whether made by virtue of any power herein granted, or by judicial authority, the TRUSTEE upon request of the holders of three-fourths in amount of the said bonds, then outstanding, may bid for and purchase or cause to be bid for and purchased, the same, for and on behalf of all the holders of the bonds hereby secured, and then outstanding, in the proportion of the respective interests of such bondholders, at a price not exceeding the whole amount of such outstanding bonds at the par value thereof, with the interest accrued thereon, and the expenses of such sale.

#### ARTICLE VIII.

In case default shall be made by the said Washington Steel & Bolt Company in the payment of any installment of interest on any of the bonds hereby secured, when such interest shall become due and payable according to the tenor of the coupons thereto annexed, and if such default shall continue for the period of six (6) months and after demand of payment made as hereinbefore in Article V provided, then and in such case the principal of all the bonds secured by this Indenture and interest, taxes and all other charges shall at the election of the TRUSTEE, evidenced by notice in writing, delivered at the office of the said Washington Steel & Bolt Company in Edmonds, Washington, or at said company's office if moved to any other place, become due and payable, anything in the said bonds or herein contained to the contrary notwithstanding; and a majority in amount of the holders of all the said bonds then outstanding, may, in writing or by a vote at a meet-



ing duly held as herein provided, instruct the TRUSTEE in such case to declare the said principal to be due, or to waive the right so to declare on such terms and conditions as such majority may deem proper, or may annul or reverse the election of the TRUSTEE; provided, however, that no waiver of any default by the Trustee or bondholders shall extend to or be taken to effect any subsequent default or impair the rights resulting from such subsequent default.

#### ARTICLE IX.

The Trustee shall at all times during the continuance of the trusts hereby created, when required so to do, as hereinafter in this Article provided, release and convey to any party or parties, who may be designated in writing by the said Washington Steel & Bolt Company, to receive such release or conveyance, or release from the lien or operation of this Indenture in such other manner as it, the TRUSTEE, may deem proper, any portion of the lands and property hereby conveyed, covered by this Indenture or intended to be covered by this Indenture, but which shall be unnecessary for use in connection therewith, or which shall be acquired or held for exchanges, depots, storehouses, shops, or other buildings, or for supplies or other material, tools, or machinery, and also shall release, or convey as aforesaid, any lands and property which may become disused by reason of any change in the said Washington Steel & Bolt Company's factory or factories, wharf or wharves, plant or plants, or of the location of said company's plant or property as hereinbefore

stated, connected with said Washington Steel & Bolt Company's factory or factories, wharf or wharves, plant or plants as aforesaid, which may be deemed by it expedient to disuse or abandon by reason of such change or otherwise, and shall also, when required as aforesaid, consent to changes in the location of said Washington Steel & Bolt Company's factory or factories, wharf or wharves, plant or plants, or of any or all of its property hereinabove mentioned, and to exchanges of property and readjustment of boundaries and shall execute and deliver the instruments necessary or proper to carry the same into effect; provided, however, that the releases or conveyances or other consents or instruments to be made by the TRUSTEE under authority of this Article shall be executed or given only upon the written request of the President of the Washington Steel & Bolt Company, showing the reason therefor, accompanied by an affidavit or affidavits of a majority of the Trustees of the said Washington Steel & Bolt Company, stating the facts upon which such request is made, which said request and affidavit shall in all cases be conclusive authority to the Trustee for the execution and delivery of such releases, conveyances, consents or other instruments; and, provided, further that any lands or property which may be acquired for the permanent use in substituting for any lands or property released under the provisions of this Article shall become and be immediately upon acquisition of the same, subject to the terms of this Indenture.

The Washington Steel & Bolt Company shall be



at liberty from time to time to dispose of, according to its discretion, such portion of the machinery, tools, implements, appliances and equipments, which shall be at any time acquired or held for the use of the said Washington Steel & Bolt Company's factory or factories, wharf or wharves, plant or plants or other property hereby conveyed, as shall have become unfit or unnecessary for such use by any and all new or other machinery, tools, implements, appliances, and equipments, which may be acquired, in substitution, for any so disposed of, shall by virtue and force of this Indenture become and be immediately upon the acquisition of the same, subject to the lien and operation of this Indenture, without any new conveyance or transfer or other act or proceeding whatsoever.

The Washington Steel & Bolt Company shall be at liberty to use any and all moneys or securities, which it may receive for or upon any sale, lease or other disposition of any lands and property made under the provisions of this Article, for the purchase or acquisition of other property, or for the improvements of said Washington Steel & Bolt Company's factory or factories, wharf or wharves, plant or plants, property, rights and privileges hereby conveyed; provided, that such purchase or acquisition shall be so made that the property so purchased or acquired shall come under and be subject to this Indenture as a first lien thereon; and in case and to the extent that the moneys or securities so received by the said Washington Steel & Bolt Company shall not be so used for the purchase or acquisition of

other property, or for the improvements of the factory or factories, wharf or wharves, plant or plants, and property hereby conveyed, the Washington Steel & Bolt Company shall pay over, assign and transfer the same to the TRUSTEE upon its request, for and upon the purposes and trusts expressed and declared in this Indenture, or intended to be expressed or declared, and the moneys so received by the Trustee shall be held by it on interest to be paid and accumulated as capital annually or semi-annually as said trustee may think to the best interests of said Washington Steel & Bolt Company, and such moneys together with all accumulations of interest shall be invested by the Trustee in the bonds hereby secured, by the purchase thereof in the open market from time to time, provided the same can be purchased at a price, which shall be satisfactory to the Washington Steel & Bolt Company, but in case the said bonds cannot be so purchased, then such moneys, together with all the accumulations of interest thereon shall be invested by the Trustee in other mortgage bonds of municipal corporations, to be approved by the Washington Steel & Bolt Company, which said other mortgage bonds shall be held by the Trustee as additional security for the bonds to be issued under this Indenture, and if any of the said bonds so held shall be paid or redeemed, the proceeds shall be reinvested in a similar manner and all interest that shall mature and be paid upon said bonds so held, shall be applied from time to time towards the payment of the interest to mature on the bonds to be issued under this Indenture, or paid



to the Washington Steel & Bolt Company for that purpose so long as there shall be no default by the said Washington Steel & Bolt Company in any of its covenants in this Indenture contained.

And, provided, further that the Trustee shall be at liberty from time to time in its discretion to change its investment in any of the said bonds, other than the bonds secured herein, or to convert the same and any other securities, which may be received from the Washington Steel & Bolt Company as in this Article provided, into cash and to apply said cash so realized from time to time to the purchase of the bonds secured by this Indenture, whenever and to the extent that the same can be acquired upon terms satisfactory to the TRUSTEE and to the said WASHINGTON STEEL & BOLT COMPANY, as aforesaid.

#### ARTICLE X.

IT IS FURTHER MUTUALLY COVENANTED, AGREED and DECLARED that the said bonds shall pass either by delivery or by transfer on the books of the Trustee in the city of Spokane, Washington, and on the books of any financial agent, which may hereafter be appointed at any other place or places in the United States or Europe by the TRUSTEE herein and the Trustees of the Washington Steel & Bolt Company, if in their judgement such appointment would be to the best interests of the bondholders hereunder, and the Washington Steel & Bolt Company further covenants and agrees that it will at all times hereafter, as long as any of the said bonds shall remain

outstanding keep a transfer office in the City of Spokane, Washington, and at such other places in the United States or in Europe, as it may hereafter appoint with the approval of the Trustee, at which office or offices a book or books shall be kept to be designated as "The Register of Bonds Issued under the First Mortgage or Deed of Trust of the Washington Steel & Bolt Company." The said bonds may be registered in the name or names of the owner thereof, or their appointees on the books of the TRUSTEE in the City of Spokane, Washington, or at such other places as it may determine as aforesaid, and such registration shall be certified on the said bonds by the Trustee, or the transfer agent of the Washington Steel & Bolt Company, and thereafter no further transfer of said bonds shall be valid, unless made on said book or books of registry thereof by the registered owner in person, or by an attorney, duly authorized and similarly certified on the said bonds; but the said bonds when so registered may be discharged from such registration by being transferred to bearer on the said book, and thereafter they shall be transferable by delivery as before registration; and the said bonds shall continue subject to successive registration, registered and transferred to bearer at the option of each holder, provided the coupon belonging thereto shall be presented with the said bonds at the time, when such registration shall be requested, and not otherwise.

#### ARTICLE XI.

It is further mutually covenanted and agreed that the Washington Steel & Bolt Company shall be liable



in *personam* for the bonds to be issued under this Indenture and the interest thereon, and for the indebtedness evidenced thereby, and that any deficit after exhausting the securities of the Washington Steel & Bolt Company's plant or plants, property and rights hereby conveyed, may be enforced against said Washington Steel & Bolt Company and all its other property; but that the stockholders of the Washington Steel & Bolt Company shall not in any way be personally liable in respect to the said bonds and coupons, or in respect to the indebtedness evidenced thereby.

#### ARTICLE XII.

It is further mutually covenanted and agreed that the word "trustee" when and as used in this Indenture is for all the purposes thereof intended to refer to and describe and shall be construed to mean the person or persons, corporation or corporations who or which, for the time being, shall be charged with the execution of the trusts of this Indenture, whether the same may be the party of the second part or any successor or successors or appointee in the trusts.

The Trustee may resign and be discharged from the trusts hereby created by giving notice in writing to the Washington Steel & Bolt Company, not less than one month before such resignation shall take effect or upon such shorter notice as the Washington Steel & Bolt Company shall accept as adequate; and the Trustee may be removed by the holders of not less than two-thirds of all the said bonds hereby secured and then outstanding, by an instrument or

instruments, in writing, under their hands and seals, or by vote at a meeting as aforesaid; and until an appointment shall have been so made by the bondholders, the president of the Washington Steel & Bolt Company with the written approval and consent of the holders of not less than one-sixth in amount of the said bonds, then outstanding, may appoint a Trustee to fill such vacancy for the time being; and in case of an appointment by a majority in interest of the bondholders, as aforesaid, and in all other cases where a change shall be made in the Trustee, the successor Trustee shall thereupon become and be vested with all the powers, authorities, estates, rights, titles, and interests granted or conveyed to, or conferred upon the party of the second part of this Indenture, and all the rights, powers, authorities and interests requisite to enable such successor trustee to execute and perform and fulfill the powers, duties and purposes of the trusts hereby created, by force of this Indenture without any further assurance or conveyance so far as such effect may be lawful; nevertheless, the Trustee resigning or removing, shall immediately execute all such conveyances or assurances and other instruments as may be satisfactory and expedient for the purpose of assuring the legal estate in the premises to the successor so appointed.

In case of a vacancy being temporarily filled by the appointment by the president of the Washington Steel & Bolt Company, under the foregoing provisions in that behalf it shall be competent for any court of equitable powers, having jurisdiction in the



premises, upon application of the holders of not less than one-tenth of the amount of the said bonds then outstanding at the time, upon due notice to the Washington Steel & Bolt Company, and for cause to be shown to annul such appointment and to appoint such trustee in the place of the Trustee so temporarily appointed, to hold the trusts for the term during which the Trustee so removed would have held the same, by virtue of the appointment by the President and no longer.

It is further mutually covenanted, agreed and declared that whenever and as often as any contingency shall arise, in which a meeting of the bondholders shall be necessary or expedient, it shall be the duty of the Trustee or the President of the Washington Steel & Bolt Company on the written request of not less than one-sixth in amount of the said bonds, then outstanding, and stating therein the purpose thereof to call a meeting of the holders of all the then outstanding bonds, to be held in the City of Spokane, Washington, by advertisement to be published daily at least for two successive weeks, in two newspapers printed and published in said city, and of good circulation in the business communities; and in default of such meeting being called by the Trustee or by the President of the Washington Steel & Bolt Company within thirty (30) days, after request, as aforesaid, it shall be competent for the holders of not less than one-sixth in amount of the said bonds, then outstanding, to call such meeting in the manner aforesaid; and any meeting called as herein provided the bondholders shall be competent to exercise in

person or by proxy all the powers and authorities conferred upon them by this Indenture; provided however, that the holders of a majority in interest of the outstanding bonds, in person or by proxy, shall be required to constitute a quorum at any such meeting and that any such vote of such meeting affecting or intended to affect any person or corporation including the parties hereto or their successors, may by such person or corporation be required to be authenticated under the hands and seals of the persons so voting.

Any declaration, request or appointment herein proved to be made by the owners of the bonds secured by this Indenture, shall be by written instrument signed by the owner or his attorney duly authorized thereto, and proved by the certificate of notary public or other officer authorized to take acknowledgment of deeds; that each person signing the same, acknowledged the execution thereof and made oath before him of the ownership of the bonds by the person claiming to own the same. Every power under which an attorney shall sign any such instrument must be proved by like certificate as to the execution and must be filed with the instrument so signed. With respect to every declaration and request, the Trustee may require any person claiming to be a holder to produce his bonds and file them with the Trustee or give other evidence satisfactory of ownership to it.

Every new Trustee however appointed must be a Trust Company. And any such new Trustee shall immediately after appointment by virtue thereof be



vested in all the estate and have all rights, powers and discretion conferred by this Indenture or the trusts herein named.

### ARTICLE XIII.

It is further understood and agreed that if the said Washington Steel & Bolt Company shall well and truly pay the indebtedness represented by the bonds to be issued under this Indenture, together with interest thereon, according to the tenor of the said bonds and of the coupons annexed thereto, and shall well and truly keep, perform, and observe all the covenants and agreements in this Indenture provided to be kept, performed and observed by it, according to the true intent and meaning thereof, then in that case the estate, right, title and interest of the Trustee and of its successor or successors in the trusts hereby created, in and to all of the Washington Steel & Bolt Company's factory or factories, wharf or wharves, plant or plants, property, rights and privileges hereby created and conveyed, shall cease and determine and this Indenture shall become void, otherwise the same shall be and remain in full force and virtue; and whenever the said bonds hereby secured shall have been fully paid, principal and interest and all the obligations of the Washington Steel & Bolt Company hereunder shall have been fulfilled, this Indenture shall be discharged by the Trustee or its successor or successors, by proper instrument or instruments, under seal duly executed and acknowledged.

### ARTICLE XIV.

The said Washington Steel & Bolt Company

hereby further covenants and agrees to keep the property hereby conveyed at all times during the life of this Indenture, insured in some good responsible insurance company or companies in reasonable amount or amounts, satisfactory to the Trustee to whom the loss, if any, shall be made payable by the terms of the policy or policies. The Trustee shall apply all moneys received from loss by fire, if any, to pay pro rata all outstanding bonds or at its option to rebuild or replace the property insured or destroyed.

#### ARTICLE XV.

The Trustee shall certify and deliver on the order of the President of the Board of Trustees of the Washington Steel & Bolt Company any number of the bonds issued hereunder to the limit of the authorized issue.

#### ARTICLE XVI.

Upon payment of the principal and interest of all the bonds issued and outstanding secured hereby, according to their terms and of the reasonable compensation and lawful charges of the Trustee, said Trustee shall on demand execute and deliver any instrument or instruments which may be necessary or proper to secure the cancellation of this Indenture, and the discharge thereof of record. The provisions of this Indenture shall bind and benefit the successors and assigns of the Washington Steel & Bolt Company and the successors of the Trustee in the trust hereby created, and shall operate to secure and benefit at all times the then holders of all the outstanding bonds to be issued.



## ARTICLE XVII.

THE WASHINGTON TRUST COMPANY, Trustee, party of the second part for itself and its successors hereby accepts the trust created and assumes the duties imposed by this Indenture upon and only upon the terms and conditions following, that is to say:

1. The Trustee may select and employ in and about the trusts and duties hereby created and imposed, suitable agents and attorneys, whose reasonable compensation shall be paid to the Trustee by the Washington Steel & Bolt Company, when necessary and proper so to do, and in default of such payment, the same shall be a charge upon the mortgaged property and its proceeds paramount to said bonds and the Trustee shall not be liable for any neglect, omission or wrong-doing of any such agent or attorney's reasonable care being exercised in their selection; nor shall it be otherwise answerable save for its own willful neglect and default.

2. The Trustee shall not be bound to take any action under this Indenture unless thereto requested in writing, as hereinbefore specifically provided, and unless such request be accompanied by satisfactory indemnity against all costs, expenses and liabilities incidental to the action requested.

3. The Trustee shall not be bound to recognize any one as a holder of said bonds, nor to take any action at his request, unless the bonds so claimed to be held shall be submitted to the Trustee for inspection, and if ownership thereof be questioned,

until the title thereto has been satisfactorily established.

4. The Trustee shall not be bound to take any action for the proper recording of this instrument as a chattel mortgage or mortgage of real estate, or for perfecting or perpetuating or keeping good the lien of this Indenture upon any portion of the property, rights and privileges hereby conveyed, but the Washington Steel & Bolt Company its successors and assigns shall from time to time do all things needful in that behalf.

5. It shall be no part of the duty of the Trustee to effect insurance against fire or other damage on any portion of the property covered by this Indenture, or to renew any policy of insurance, or to keep itself informed or advised as to payment of any tax or assessment or to require such payment to be made, but the Trustee may in its discretion, after notice and refusal or neglect of said Washington Steel & Bolt Company so to do, do any or all of the matters and things in this Article set forth, or require the same to be done. It shall only be responsible for reasonable diligence in the performance of its trusts.

6. The Trustee shall be entitled to a reasonable compensation— for its services and to reimbursement for all expenses, properly incurred under this Indenture, including the expenses of the proper prosecution or defense of any suit or proceeding instituted by or against it; and such compensation and expense shall constitute a first charge upon all the property, rights and privileges hereby conveyed,



and upon any fund which may come to the hands of the Trustee under this Indenture.

7. In case at any time it shall be necessary and proper in the judgement of the Trustee for it to make any investigation respecting any fact or facts preparatory to taking or not taking any action, or doing or not doing anything as such Trustee, the certificate of the Washington Steel & Bolt Company under its corporate seal, attested by the signature of its Secretary and affidavit of one or more Trustees, shall be conclusive evidence of such fact or facts to protect the Trustee in any action that it may take by reason of the supposed existence of such fact; but this provisions shall not apply to any case in which any other provision is herein contained as to such evidence.

8. All recitals, statements of facts and representation herein contained are made on behalf of the Washington Steel & Bolt Company and the Trustee assumes no responsibility as to the correctness of the same; nor is the Trustee to be understood as making any representation as to character, extent or value of the mortgaged property, or as to the title thereto.

#### ARTICLE XVIII.

It is also mutually understood and agreed that the Articles of Incorporation and by-laws of the Washington Steel & Bolt Company, or either of them may at any time during the life of this Indenture, when it appears to the best interests of said Washington Steel & Bolt Company, be amended by making changes therein, adding to or taking away as may

be by them considered to the best interests of all the parties interested therein, as aforesaid, which change or amendment if made, shall in no way effect the lien or validity of this Indenture, provided, nevertheless, that said articles of incorporation or by-laws shall not be changed or amended in any particular, whereby said change or amendment shall lessen or tend to lessen the security, rights or privileges of any person or persons or corporation owning and holding bonds secured or intended to be secured under and by this Indenture, or that will in any way lessen the rights and privileges of the Washington Steel & Bolt Company, or the Trustee under this agreement.

#### ARTICLE XIX.

It is also mutually understood and agreed that as a further condition running with this Indenture that any bond or bonds issued under or secured by this Indenture shall not be sold or disposed of directly or indirectly at a greater discount than five (5%) per cent thereof, that is to say, said bond or bonds shall not be sold or disposed of for less than ninety-five (95) cents on the dollar, of the par or face value of said bonds.

IN WITNESS WHEREOF, the WASHINGTON STEEL & BOLT COMPANY has caused this Indenture to be signed in its corporate name, by its President or Vice-president, and its corporate seal affixed hereto, and attested by its Secretary or Assistant Secretary; and the said WASHINGTON TRUST COMPANY, Trustee, to evidence its acceptance of the trusts hereby created has caused



this Indenture to be signed in its corporate name, by its President or Vice-president and its corporate seal to be hereto affixed and attested by its Secretary or Assistant Secretary the day and year in this Indenture first above written.

WASHINGTON STEEL & BOLT COMPANY,

By A. McPHADEN,  
President.

Attest: A. G. PIKE,  
Secretary.

Washington Steel and Bolt Company, Seal. Incorporated 1906, Edmonds, Wash.

THE WASHINGTON TRUST COMPANY,

By J. GRIER LONG,  
Vice President.

Attest: R. L. WEBSTER,  
Secretary.

The Washington Trust Co., Incorporated 1902, Spokane, Wash.

State of Washington,  
County of Spokane,—ss.

On this 1st day of September A. D. 1908, before me personally appeared Alexander McPhaden to me known to be the President and A. G. Pike to me known to be the Secretary of the WASHINGTON STEEL & BOLT COMPANY, the corporation that executed the within and foregoing instrument and on oath acknowledged the said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned, and

on oath, each for himself and not one for the other, stated that he was authorized to execute said instrument and the seal affixed is the seal of the said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal in this certificate first above written.

S. F. STREET,

Notary Public in and for the State of Washington,  
residing at Edmonds, Washington.

S. F. Street, N. P. Seal. Com. Exp. Nov. 19, 1911.

State of Washington,  
County of Spokane,—ss.

ALEXANDER McPHADEN and A. G. PIKE, each being duly sworn on oath depose and say: That they are respectively the President and Secretary of the WASHINGTON STEEL & BOLT COMPANY, a corporation that executed the foregoing instrument; that they signed and executed the same on behalf of the Washington Steel & Bolt Company, by authority of the Board of Trustees thereof, and they make this affidavit in behalf of said Washington Steel & Bolt Company, because it is a corporation and they personally acknowledge the facts; that said instrument as a mortgage of personal property, was made in good faith and without any design to hinder, delay, or defraud creditors.

A. McPHADEN.

A. G. PIKE.



Subscribed and sworn to before me this 1st day of September, A. D. 1908.

S. F. STREET,  
Notary Public in and for the State of Washington,  
residing at Edmonds, Washington.

S. F. Street, N. P. Seal.

Com. Exp. Nov. 19, 1911.

STATE OF WASHINGTON,  
COUNTY OF SPOKANE,—ss.

On this 9th day of September, 1908, before me personally appeared J. Grier Long, Vice-president and R. L. Webster, Secretary of THE WASHINGTON TRUST COMPANY of Spokane, Washington, the corporation that executed, as Trustee, the within and foregoing instrument and acknowledged the said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned and on oath stated that they were authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

FRANK J. GUSE,  
Notary Public, in and for the State of Washington,  
Residing at Spokane, Washington.

Frank J. Guse, N. P. Seal. Com. Exp. April 17,  
1911.

Filed for record at request of The Washington Trust Co. Sep. 16, 1908, at 11:15 A. M.

S. VESTAL,  
County Auditor.  
By L. M. Noland,  
Deputy.

Vol. 69 M. P. 388.

State of Washington,  
County of Snohomish,—ss.

I, P. T. LEE, Auditor of Snohomish County, State of Washington, and ex-officio Recorder of Deeds in and for said County do hereby CERTIFY the above and foregoing to be a true and correct transcript of a mortgage or Deed of Trust from the WASHINGTON STEEL & BOLT COMPANY to the WASHINGTON TRUST CO. now of record in this office in volume 69 of Mortgages, page 338, and also duly filed and Indexed as a Chattel Mortgage under file number 133,386, Records of said Snohomish County, Wash.

Witness my hand and Official Seal this 11th day of March, A. D. 1913.

[Seal] P. T. LEE,  
County Auditor and Ex-officio Recorder of Deeds in  
and for said County.

By John Haugen,  
Deputy.

No. 17. 133,386. First Mortgage or Deed of Trust of Washington Steel & Bolt Company to The Washington Trust Co. Office of County Auditor, County of Snohomish, State of Washington,—ss. Filed for record at request of The Washington Trust



Co. on Sep. 16, 1908, at 15 min. past 11 o'clock A. M., and recorded in Vol. 69, Mortgages, page 388, Records of said County. S. Vestal, County Auditor. By A. J. Wolfe, Deputy. Rec. and File, 20.00. 2357

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2357

Filed in the United States District Court, Western District of Washington. Jul. 9, 1913. Frank L. Crosby, Clerk.

[Endorsed]: No. 2512. U. S. Circuit Court of Appeals for the Ninth Circuit. Claimants Exhibit 2. Received Jan. 5, 1915. F. D. Monckton, Clerk.

**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

THE WASHINGTON TRUST COMPANY,

Petitioner,

vs.

EDWARD H. CHAVELLE, as Trustee of the Estate of WASHINGTON STEEL & BOLT COMPANY, a Corporation, Bankrupt,

Respondent.

**Petition for Revision**

Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, of Certain Orders of the United States District Court for the Western District of Washington, Northern Division.

**Filed**

FEB 5 - 1915

**F. D. Monckton,**  
Clerk.





United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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THE WASHINGTON TRUST COMPANY,

Petitioner,

vs.

EDWARD H. CHAVELLE, as Trustee of the Estate of WASHINGTON STEEL & BOLT COMPANY, a Corporation,  
Bankrupt,

Respondent.

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**P**etition for Revision

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July 1, 1898, to Revise, in Matter of Law, of Certain Orders  
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Northern Division.

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the United States Circuit Court of Appeals, Ninth  
District*

No. 4717.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY, a Corporation,  
Bankrupt.

**Petition for Supervision and Revision.**

To the Honorable Judges of the Circuit Court of  
Appeals of the Ninth District:

Your petitioner, the Washington Trust Company, feeling itself aggrieved by the orders, judgments and proceedings hereinafter referred to and described, hereby petitions the Court to superintend and revise the said orders and judgments, and in that connection and to that end your petitioner respectfully shows as follows:

I.

That it resides at Spokane in Spokane County, State of Washington, and in the above-entitled district, and is a creditor of the Washington Steel & Bolt Company, a corporation, the above-entitled bankrupt, who was adjudged a bankrupt by the District Court of the United States for the Western District of Washington, Northern Division, on the 19th day of September, 1911.

II.

That after such adjudication the following proceedings were had in the case of the said bankrupt, which have resulted prejudicial, as your petitioner verily believes, to the legal rights and remedies of your petitioner:



a. That heretofore, to wit, during the month of May, 1912, Edward H. Chavelle, as trustee of the estate of the above-entitled bankrupt, filed a petition before the Honorable John P. Hoyt, the Referee, to which the above-entitled matter had been duly and [1\*] regularly referred by the said District Court, wherein the said trustee sought to have all the property of the said bankrupt sold for cash, free and clear of encumbrances.

b. That a notice and citation was issued to your petitioner to appear, and show cause why the said property should not be sold.

c. That in answer to said notice your petitioner, on the third day of June, 1912, filed an Answer thereto, which Answer contained also a cross-petition setting forth the facts that on September 1, 1908, the said bankrupt, the Washington Steel & Bolt Company, while it was engaged in the transaction of its own business and four months prior to the decree or order adjudging it a bankrupt, made, executed and delivered to your petitioner a trust deed, securing bonds to be issued in the sum of Two Hundred Thousand Dollars (\$200,000.00), which deed covered all the property of the Washington Steel & Bolt Company and was recorded in Volume 69 of Mortgages, at page 388, Record of Mortgages of Snohomish County, Washington, that being the county in which the property of the said Washington Steel & Bolt Company was situated, and that the said mortgage was duly filed as a chattel mortgage, and that the bonds to the amount of \$53,100.00 had been

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\*Page-number appearing at foot of page of original certified Record.

negotiated by the said Washington Steel & Bolt Company, and were outstanding, and that in compliance with the provisions of said mortgage the holders of said bonds requested your petitioner to foreclose the mortgage and take such steps as might be necessary to protect their interests in the premises, and prayed that the petition of the said Trustee in Bankruptcy be denied and that it, your petitioner herein, be granted an order authorizing and empowering it to foreclose this mortgage upon the real and personal property belonging to said bankrupt, and that the cross-petition of the Washington Trust Company was amended to fix the date of the execution of the said mortgage as the 9th day of September to correspond with the date of the acknowledgment appearing thereon. [2]

d. This answer and cross-petition was afterwards, to wit, on August 14, 1912, supplemented by another petition, substantially in the form of the former petition, asking leave to foreclose said mortgage, to which answer and cross-petition and petition the Trustee in Bankruptcy answered, denying certain allegations therein and alleging that no bonds were regularly issued by the said Washington Steel & Bolt Company, as provided in said trust deed, and that all the bonds issued by the Washington Steel & Bolt Company in connection with said deed and trust were fraudulent and void, and prayed that the prayer of your petitioner be denied to which affirmative matter a reply was filed by your petitioner denying the affirmative matter in said answer.

e. That evidence was taken upon the issues so



joined, and on the 26th day of November, 1912, the Referee rendered a memorandum of decision granting the Washington Trust Company leave to foreclose its mortgage upon paying into bankrupt court the sum of Twelve Hundred Dollars (\$1200.00) to defray the expenses incident to the care of the property and certain charges for the referee and trustee in bankruptcy, and on the 19th day of December, 1912, entered a formal order granting your petitioner leave to foreclose upon the payment of said sum.

f. That your petitioner, feeling itself aggrieved by the said decision and order, had the correctness of said order reviewed by the District Court, and that thereafter, on the third day of March, 1913, the said District Court reversed the ruling of the said Referee and referred the case back for the further taking of testimony upon all questions relative to the scope and validity of the mortgage and the bonds secured thereby and directed that when such questions had been determined the trustee must elect whether he would administer the equity of redemption in the property for the benefit of general creditors provided said mortgage and bonds are held valid, or surrender the mortgaged property to the mortgagee for foreclosure. From this order there was no appeal and [3] the cause was sent back for the taking of testimony pursuant thereto. After taking the testimony on May 15, 1913, the Honorable John P. Hoyt, Referee, rendered a memorandum decision holding that the said trust deed was void, and on June 16, 1913, following, entered a formal

order denying the petition of your petitioner to foreclose upon the ground and for the reason that the said mortgage and bond were null and void.

g. Your petitioner, feeling itself aggrieved by said decision, had the correctness thereof reviewed by the judge of the district court, who, on the 15th day of September, 1913, filed a memorandum decision holding the trust deed valid but referred the cause back to the referee for the taking of further testimony upon the amount due and owing upon the bonds and under date of November 14, 1913, entered a formal order by said judge of the district court, referring the case back pursuant to the tenor of said opinion. Further testimony was taken. Thereafter, on the 20th day of July, 1914, the referee made his Findings of Fact and Conclusions of Law, and on the same day entered an order wherein and whereby it was ordered that the prayer of the petition of your petitioner to foreclose said mortgage be denied, and that the claim of the Washington Trust Company be rejected and disallowed and expunged from the list of claims upon record in this case, and the said referee in bankruptcy, on July 28, 1914, entered an order upon the petition of the trustee in bankruptcy to sell said property authorizing and directing him to sell all the property of the said bankrupt, which property was covered by said mortgage, for cash, free and clear of claims of the said mortgage and the said bonds. Each of said orders was taken to the district judge upon a petition for review. The Honorable Jeremiah Neterer, as District Judge, on the 15th day of September, 1914, rendered a mem-



orandum opinion, in which he held bonds amounting to \$37,000.00 valid and \$25,000.00 invalid, and that the said bonds were secured [4] by the trust deed which was valid, but afterwards modified his decision holding \$10,000 of said bonds valid and the remaining bonds void and confirmed the order of the referee directing that the property be sold for cash by the said trustee, and denying the holders of the bonds, which were declared valid, the right to use their bonds in any manner in bidding at said sale. Exceptions were duly taken to the ruling of the said district judge and certain findings or orders were presented by your petitioner for signing, signing of which was refused by the said judge, and this petition is to review the correctness of the ruling of the said judge upon said matters.

A copy of the order directing a sale of the property free and clear of encumbrances is hereto attached and marked Exhibit "A."

A copy of the memorandum opinion rendered by the said judge is hereto attached and marked Exhibit "B."

A copy of the order pronouncing the invalidity of said bonds is hereto attached and marked Exhibit "C."

A copy of the exceptions made thereto by your petitioner is hereto attached and marked Exhibit "D."

A copy of the decree or order proposed by your petitioner and refused by the said judge, together with his notation as to the exception thereto, is hereto attached and marked Exhibit "E."

A copy of the order of the said honorable judge

confirming the order of the referee for the sale of said property is hereto attached and marked Exhibit "G."

### III.

That the ruling of the said Honorable Jeremiah Neterer was erroneous in law and in fact in the following particulars: [5]

a. Said order was erroneous in that it did not adjudge each bond held by the Bank of Montreal valid, and in that it omitted to include in the valid bonds of the Washington Steel & Bolt Company the bonds held by the Bank of Montreal.

b. Said order was erroneous in that it held \$1500.00 of the par value of the bonds held by C. F. Chapin void.

c. Said order was erroneous in that it did not adjudge that all the bonds held by Thomas S. Burley were valid and in omitting from the bonds held valid the bonds held by Thomas S. Burley.

d. The action of the said judge was erroneous in that it did not require the said trustee in bankruptcy to administer upon the equity of redemption in said property for the benefit of general creditors, or to surrender the property for foreclosure.

e. The said judge erred in refusing to incorporate in his order and judgment Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18a and 18b of the order or decree proposed by your petitioner, and each of them.

f. That the said court erred in affirming the order of the referee directing a sale of the said lands and premises for cash.



g. The said order was erroneous in that it provided that a certain portion of the proceeds of the sale of the said property should be applied to the payment of the expenses of the bankruptcy proceedings before the application of any of said funds to the payment of said bonds.

IV.

That the amount involved in the above controversy exceeds the sum of \$2,000.00, and that the par value of said bonds, exclusive of interest, amounts to approximately \$45,000.00. [6]

WHEREFORE, your petitioner, feeling aggrieved because of such orders, and each of them, asks that the same may be reviewed in matters of law by your honorable court, as provided in Section 24-B of the Bankruptcy Law of 1898 and the rules and practice in such case provided.

WASHINGTON TRUST COMPANY,

By JAMES B. MURPHY,

Its Attorney.

JAMES B. MURPHY,

Attorney for Petitioner. [7]

State of Washington,  
County of King,—ss.

I, James B. Murphy, being first duly sworn upon oath, deposes and says: That he is the attorney for the petitioner above named, the Washington Trust Company; that the Washington Trust Company has no officer or agent within the County of King, State of Washington, or nearer than Spokane, and that affiant is the agent and attorney of the said Washington Trust Company for the purposes of all

litigation in the above-entitled matter and the prosecution of this petition for review, and that the statement of facts contained in the foregoing petition for review are true according to the best of my knowledge, information and belief.

JAMES B. MURPHY.

Subscribed and sworn to before me this 26 day of October, 1914.

[Seal]

ISRAEL NELSON,  
Notary Public in and for the State of Washington,  
Residing at Seattle, County and State Aforesaid.

[8]

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*In the United States District Court for the Western  
District of Washington, Northern Division.*

No. 4717.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY, a Corporation,

Bankrupt.

**Exhibit "A" [to Petition for Revision—Order of  
Referee Directing Sale of Certain Property,  
etc.].**

**ORDER DIRECTING SALE FREE AND CLEAR  
OF LIENS.**

An order having been heretofore made herein requiring the Washington Trust Company, and all creditors of the above-named bankrupt, to show cause before this Court, at the office of Hon. John P. Hoyt, Referee, why an order should not be made herein, directing that all the property, now in the possession of said Trustee and mentioned and described in the



petition filed therefor, be sold in the manner prescribed by the acts of Congress relating to bankruptcy and the General Orders of the Supreme Court of the United States, free of and from the lien of the mortgage held by The Washington Trust Company, and free of and from all liens, and why the proceeds arising of and from said sale should not be held by the said Trustee subject to the lien of said mortgage (provided the same was held a valid and subsisting lien), to all intents and purposes as though the said property had not been sold; subject to the final order, judgment and decree of this Court as to the validity, *bona fides* and extent of the said mortgage, and for other and further relief. Now, upon reading and filing the said order to show cause, and upon the petition of Edward H. Chavelle, Trustee, theretofore filed herein; and upon the petition in bankruptcy herein, the testimony taken under said petition and the answer of the said the Washington Trust Company.

And after hearing counsel for the Trustee in favor thereof, and counsel for said The Washington Trust Company in opposition thereto—the creditors of said bankrupt having appeared and urged the granting of the prayer of said petition—and it appearing to the [9] satisfaction of this Court that the best interests of the creditors of the said bankrupt above named will be subserved by the granting of said application, and for divers other reasons that the said application is proper, it is hereby

ORDERED, ADJUDGED and DECREED that Edward H. Chavelle, as Trustee of Washington Steel

& Bolt Company, Bankrupt, be, and he hereby is authorized, directed and permitted to sell and dispose of, in the manner and mode prescribed by the acts of Congress relating to bankruptcy and the General Orders of the Supreme Court of the United States, all of the property of the Washington Steel & Bolt Company, bankrupt, situate and located at Edmonds, Snohomish County, Washington, and more particularly described in a certain indenture of mortgage heretofore made by Washington Steel & Bolt Company to the Washington Trust Company to secure an issue of \$200,000 of bonds, dated September 1, 1908, and recorded on the — day of September, 1908, in Book — of Mortgages at page —, in the office of the Auditor of Snohomish County, Washington.

And it further Ordered, Adjudged, and Decreed that the said Edward H. Chavelle, as Trustee, be, and he hereby is authorized, directed and permitted to sell and dispose of the said property in said mortgage more particularly mentioned and described, free of and from the lien thereof, and that the proceeds arising from the sale of said property be held by the said Trustee subject to the lien of said mortgage, as if said property had not been sold, subject to the final order, judgment and decree of this Court adjudicating the validity, *bona fides* and extent of the said mortgage.

Dated July 28, 1914.

JOHN P. HOYT,  
Referee in Bankruptcy. [10]



*United States District Court, Western District of  
Washington, Northern Division.*

No. 4717.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY,

Bankrupt.

**Exhibit "B" [to Petition for Revision—Opinion of  
Neterer, D. J., Modifying Order of Referee in  
Bankruptcy, etc.].**

Filed Sept. 15, 1914.

ON PETITION TO REVIEW ORDER OF REF-  
EREE. ORDER MODIFIED.

JAMES B. MURPHY, for Petitioner.

J. W. RUSSELL, for Trustee.

NETERER, District Judge:

This case has been before the Court on two or three prior occasions, and the last hearing was upon a petition to review the order of the Referee in which he held the mortgage in issue to be invalid. The Court reversed the order of the Referee and held the mortgage valid because it was regularly signed by the Secretary and President of the corporation and authenticated by the corporate seal which was affixed, and its execution was admitted by the trustee. As to the issuance of the bonds, the Court expressed some view of the bonds under the testimony submitted, but said:

"I am unable to determine from the testimony the amount of the bonds that were legally issued."  
and remanded the case to the Referee, with instruc-

tions, "*to ascertain the amount and status of all bonds and report to the Court, to the end that all parties may receive equal protection.*"

The testimony has been submitted to the Referee by all contending parties as to the legal status of the bonds. Upon the conclusion of the hearing, the Referee held that none of the bonds had been legally issued; that they were invalid and therefore not claims against the bankrupt estate, and also entered an order directing the property to be sold free and clear of all indebtedness. This order, and the order [11] holding the bonds invalid, are before the Court at this time.

From a consideration of all of the evidence presented, I am of the opinion that the \$23,400.00 of bonds issued to McPhaden, and the \$2,900.00 of bonds issued to Pike, issued for past indebtedness to Pike and McPhaden for monies advanced by them to the corporation long prior to the date of the bonds, and transferred to the Bank of Montreal as collateral security for money paid to the company, are liabilities to the extent of the advances. There were also regularly issued: to C. F. Chapin, \$2,500.00; Meta McElroy, \$2,000.00; J. H. Osborne, \$5,900.00; and Thomas S. Burley, \$2,600.00. The bonds issued to these last-named parties were upon considerations paid by these several parties to McPhaden, who paid that money to the Washington Steel & Bolt Company, which he was representing, and it was used by the company in the regular course of business, and all benefits arising from such payments accrued to the corporation. These several



parties having thus paid their money upon the faith and credit of these bonds and the mortgage, should not now be deprived of the benefits accruing by reason of such security, after the corporation had used their money, some of which, perhaps, now representing some of the assets. The contention that the bonds are void because of the fact that a commission was paid to the person negotiating the bonds cannot be well founded as against the parties who paid ninety-five cents on the dollar, which the testimony shows these several parties did, except as to the bank holding the bonds issued to McPhaden and Pike as collateral security.

The \$25,000.00 bonds issued to the Bank of Montreal as collateral security, I do not think are a valid claim. The bonds were delivered without any authority, either fact [12] or law. There is no testimony before the court that the delivery of these bonds was ever authorized in a legal manner, and if a proper resolution had been passed, the authority under which the bonds were executed did not comprehend the issuance of bonds for any such purpose.

I think the findings and conclusions of the Referee should be modified in so far as they relate to the \$23,400.00 of bonds issued to McPhaden, and the bonds issued to C. F. Chapin, Meta McElroy, J. H. Osborne, Thomas S. Burley and Pike. I think that the property should be sold, and the proceeds applied to the payment of the claims of the Bank of Montreal, to the extent of its interest in the McPhaden and Pike bonds held as collateral, and also the bonds of Chapin, McElroy, Osborne and Burley,

less such proportion of the expenses as should be paid by said interests in this bankruptcy proceeding, and the balance, if any, less expenses of administration, to be distributed among the general creditors, as provided by the Bankruptcy Act.

Let an order be presented.

JEREMIAH NETERER,

Judge. [13]

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*In the United States District Court for the Western  
District of Washington, Northern Division.*

No. 4717.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY, a Corporation,

Bankrupt.

**Exhibit "C" [to Petition for Revision—Order Modifying Order of Referee of July 20, 1914, etc.].**

**ORDER ON REVIEW FROM ORDER OF  
REFEREE.**

This matter having been brought before the referee by the petition of The Washington Trust Company for leave to foreclose a certain mortgage, executed by the bankrupt, outside of the bankruptcy court; and the referee having granted leave to so foreclose upon terms; and the petitioner, The Washington Trust Company, having taken a review from said order; and this court having reversed said order, directed the mortgage, if valid, to be foreclosed in the bankruptcy court, and sent the matter back to the referee to take proofs as to the validity of said mortgage and the bonds issued thereunder;



and proofs having been offered before the referee as to the validity of said mortgage, but not as to the validity of said bonds; and said referee having made and entered an order declaring said mortgage invalid; and the petitioner, The Washington Trust Company, having taken a review from said order to this court; and this court having held said mortgage valid, reversed said order, and sent the matter back to the referee to take proof as to the validity of said bonds, and to make findings and conclusions thereon; and said referee having taken such proofs, and having made findings and conclusions thereon, and having made and entered an order on the 20th day of July, 1914, declaring all of said bonds invalid, and rejecting, disallowing and expunging the claim of the petitioner, the Washington Trust Company, based thereon, from the records; and said petitioner having filed exceptions to said findings and conclusions, and having taken a review from said order to this court; and the matters raised by said review having been heard and considered by this court,

IT IS ORDERED that said report and order of July 20, 1914, be, and the same hereby is, modified to the extent of holding that \$1,000 of the bonds held by C. F. Chapin, and the \$2,000 of bonds held by Meta [14] McElroy, and the \$7,000 of bonds held by J. H. Osborne are valid, and as so modified said order is hereby confirmed.

The trustee in bankruptcy duly excepts to such modification, and his exception is hereby allowed.

And the property covered by said mortgage hav-

ing been ordered sold free and clear from the lien thereof.

IT IS HEREBY FURTHER ORDERED that the proceeds thereof be paid to Washington Trust Co. on account of the claims of said Chapin, McElroy and Osborne, less such proportion of the expenses and costs as should be paid by said interests in this proceeding, and that the balance thereof, if any, less expenses of administration, be distributed among the creditors, as provided by the Act.

Oct. 16, 1914.

JEREMIAH NETERER,

Judge. [15]

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*In the District Court of the United States in and for  
the Western District of Washington, Northern  
Division.*

No. —.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY, a Corporation,

Bankrupt.

**Exhibit "D" [to Petition for Revision—Exceptions  
of Washington Trust Co. to Approval of Find-  
ings and Report of Referee].**

Filed Oct. 16, 1914.

COMES NOW the Washington Trust Company, by its Attorney, the undersigned, at the time of the signing of the Order by the above-entitled Court, passing upon the Petition of said Washington Trust Company, reviewing the Findings and Report of the Referee in this matter, which Findings and Report



were made by the Referee on July 20, 1914, and excepts to the Court's ruling as follows:

I.

The Washington Trust Company excepts to the Court's refusal to sustain its exception and objection made to Finding I of said Referee.

II.

The Washington Trust Company excepts to the refusal of the Court to sustain its exception to Finding V of said Referee and the whole and every part thereof.

III.

The Washington Trust Company excepts to the Court's refusal to specifically sustain its exceptions and objections to Finding VI of the Referee.

IV.

The Washington Trust Company excepts to the Court's refusal to specifically sustain its exceptions and objection to Finding VII made by said Referee.  
[16]

V.

The Washington Trust Company excepts to the Court's refusal to specifically sustain its exception to Finding VIII made by said Referee.

VI.

The Washington Trust Company excepts to the Court's refusal to specifically sustain its exception to Finding IX made by said Referee.

VII.

The Washington Trust Company excepts to the Court's refusal to specifically sustain its exception to Finding XI made by said Referee.

VIII.

The Washington Trust Company excepts to the Court's refusal to specifically sustain its exception to Finding XII made by said Referee.

IX.

The Washington Trust Company excepts to the Court's refusal to specifically sustain its exception to Finding XIII made by said Referee.

X.

The Washington Trust Company excepts to the Court's refusal to specifically sustain its exception to Finding XIV made by said Referee.

XI.

The Washington Trust Company excepts to the Court's refusal to specifically sustain its exception to Finding XV made by said Referee.

XII.

The Washington Trust Company excepts to the Court's refusal to specifically sustain its exception to Finding XVI made by said Referee. [17]

XIII.

The Washington Trust Company excepts to the Court's refusal to specifically sustain its exception to Finding XVII made by said Referee.

XIV.

The Washington Trust Company excepts to the refusal of the Court to sustain each and every exception and objection made and contained in the Petition of the Washington Trust Company for the review of the Report of the Referee made on July 20, 1914, and the order of the Referee during the sale



of the property made by said Referee on July 28, 1914.

### XV.

The Washington Trust Company excepts to the whole and every part of the order entered by the above-entitled court on the 16th day of October, 1914, and specifically to that part of said order wherein and whereby the Court confirms the report and order of the said Referee, which it reviewed, except as in said order modified.

### XVI.

The said Washington Trust Company further excepts to that part of the order directing the proceeds of the sale to be applied upon the claims of Chapin, McElroy and Osborne, omitting any claims which the Washington Trust Company may have for its services as trustee, and its costs and commissions and expenses in the prosecution in the above-entitled action.

### XVII.

The said Washington Trust Company excepts to that portion of said decree subjecting the proceeds of the sale of said property to a portion of the expenses and costs of the said bankruptcy proceedings and excepts to every part of said order directing the sale of the said property. [18]

### XVIII.

The Washington Trust Company further excepts to the Court's refusal to specifically sustain its objections and exceptions to Conclusion I made by said Referee.

XIX.

The Washington Trust Company further excepts to the Court's refusal to specifically sustain its objections and exceptions to Conclusion II made by said Referee.

XX.

The Washington Trust Company further excepts to the Court's refusal to specifically sustain its objections and exceptions to Conclusion III made by said Referee.

XXI.

The Washington Trust Company further excepts to the Court's refusal to specifically sustain its objections and exceptions to Conclusion IV made by said Referee.

XXII.

The Washington Trust Company further excepts to the Court's refusal to specifically sustain its objections and exceptions to Conclusion V made by said Referee.

XXIII.

The Washington Trust Company further excepts to the Court's refusal to specifically sustain its objections and exceptions to Conclusion VI made by said Referee.

XXIV.

The Washington Trust Company further excepts to the Court's refusal to specifically sustain its objections and exceptions to Conclusion VII made by said Referee.

JAMES B. MURPHY,

Attorney for Washington Trust Company. [19]



The foregoing exceptions were, at the time of the signing of the Order herein, considered by the Court, and said exceptions were allowed.

Oct. 16, 1914.

JEREMIAH NETERER,

Judge. [20]

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*In the District Court of the United States in and for  
the Western District of Washington, Northern  
Division.*

No. —.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY, a Corporation,

Bankrupt.

**Exhibit "E" [to Petition for Revision—Form of  
Decree Proposed by Washington Trust Co., and  
Refusal of Court to Sign Proposed Decree, etc.].**

THE WASHINGTON TRUST COMPANY requests the incorporation in the Order of the Court, each (severally), of the following provisions:

This matter having been presented to this Court, upon the petition to review the Findings and Conclusions and Judgment of the Referee in passing upon the validity of the bonds issued by the Washington Steel & Bolt Company, which judgment was entered by the Referee on July 20, 1914, and upon petition for the review of the Order of the Referee on July 28, 1914, made herein, directing a sale of the mortgaged property for cash, free and clear of the encumbrance of said mortgage, and the Court having duly considered the said petitions and the arguments

made in support thereof, and becoming fully advised in the premises; Now, therefore,

1. IT IS HEREBY ORDERED, ADJUDGED and DECREED that the said Findings made by the Referee herein, and the whole of said Findings, as well as the Conclusions deduced therefrom, be and the same are overruled, vacated and set aside, and

2. IT IS FURTHER ORDERED, ADJUDGED and DECREED that said Order and Judgment, and the whole thereof, entered herein by the said Referee, holding that the bonds issued by the above Bankrupt were void and of no effect, and denying the prayer of the Washington Trust Company, and holding that the claim of the Washington Trust Company be rejected and disallowed and expunged from the list [21] of claims, which order was entered on July 20, 1914, be and the same is hereby vacated and set aside, and

3. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the order entered herein on July 28, 1914, by the said referee directing and ordering a sale of the property of the Washington Steel & Bolt Company for cash, free and clear of the encumbrance of said mortgage, be and the same is hereby overruled and set aside.

4. IT IS FURTHER ORDERED, ADJUDGED and DECREED that those certain bonds filed as exhibits herein on behalf of the Bank of Montreal and numbered 661 and 663, 667 to 671, each inclusive; 674 to 690, each inclusive; 695 and 699, being twenty-six (26) bonds of the denomination of \$500.00 each and of the total par value of \$13,000.00; bonds num-



bered 702 and 704, being two bonds of the denomination of \$1,000.00 each, making a total par value of \$2,000.00; bonds numbered 291 to 300, each inclusive, being ten bonds of the denomination of \$100.00 each, making a total par value of \$1000.00; bonds numbered 399 to 407, each inclusive, being nine bonds of the denomination of \$100.00 each, making a total par value of \$900.00; bonds numbered 691 to 694, each inclusive, being four bonds of the denomination of \$500.00 each, making a total par value of \$2,000.00; bonds numbered 665, 666, 672, 673, being four bonds of the denomination of \$500.00 each, making a total of \$2,000.00; bonds numbered 703 and 707, being two bonds of the denomination of \$1000.00 each, making a total par value of \$2,000.00, all of which bonds are held by the Bank of Montreal and are of the total par value of \$22,900.00, are, as to the Bank of Montreal, valid and existing obligations of the Washington Steel & Bolt Company, and secured by the trust deed hereinafter described to the extent of the money due from the Washington Steel & Bolt Company to the Bank of Montreal, a corporation.

[22]

5. IT IS FURTHER ORDERED, ADJUDGED and DECREED, for the apportionment and distribution of the property or proceeds of the sale hereinafter provided for as between the holders of bonds, that the bonds held by the Bank of Montreal represent an indebtedness, including interest, of \$31,012.66.

6. IT IS FURTHER ORDERED, ADJUDGED and DECREED that those certain bonds in the possession of the Bank of Montreal issued by the Wash-

ington Steel & Bolt Company and numbered 705, 708 to 716, each inclusive, and 718 to 732, each inclusive, making 25 bonds each of the denomination of \$1000.00, making a total par value of the sum of \$25,000.00, which bonds are those delivered direct by the Washington Steel & Bolt Company to said bank, are valid and existing obligations of the Washington Steel & Bolt Company as security for the indebtedness of said Washington Steel & Bolt Company to said Bank of Montreal.

7. IT IS FURTHER ORDERED, ADJUDGED and DECREED, for the purpose of apportioning the proceeds of said sale among the Bank of Montreal and the owners of the other bonds, that the said bonds last hereinbefore described shall be estimated at their face value of \$25,000.00 and accrued interest amounting to the sum of \$———.

8. IT IS FURTHER ORDERED, ADJUDGED and DECREED that there is now due and owing from the Washington Steel & Bolt Company to the Bank of Montreal the full and just sum of \$20,000.00, together with the interest thereon at the rate of eight per cent (8%) per annum from the 23d day of December, 1910, making a total to this date of principal and interest of the sum of \$26,033.30, and that the said indebtedness is secured by the bonds hereinbefore mentioned and held to be valid.

9. IT IS FURTHER ORDERED, CONSIDERED and DECREED that J. H. Osborne is the owner of the following bonds of said issue which bonds are upon file as exhibits herein; numbers 410 to 438, each inclusive, being 29 bonds of the denomina-



tion of \$100.00 each, making a total par value of \$2,900.00; bonds numbered 655 [23] to 660, each inclusive, being six bonds of the denomination of \$500.00 each, making a total par value of \$3,000.00, bond numbered 400 of the denomination of \$100.00, bonds numbered 653 and 654 of the denomination of \$500.00 each, making a total par value of \$1100.00, making a grand par value total of \$7,000.00; that interest has been paid on the bonds held by the said Osborne as aforesaid to the first day of March, 1912, and to no later date, and that there is now due and owing to the said Osborne, represented by said bonds, the sum of \$7,000.00, together with interest thereon at the rate of 8% per annum from the first day of March, 1912, making a total to this date of principal and interest of the sum of \$8,446.17.

10. IT IS FURTHER ORDERED, ADJUDGED and DECREED that C. F. Chapin is the owner of the following described bonds of said issue, to wit: Bonds numbered 696 to 698, each inclusive, being three bonds of the denomination of \$500.00 each and representing a total par value of \$1500.00, and bonds numbered 662 and 664, being two bonds of the denomination of \$500.00 each totaling \$1000 and making a grand total of \$2,500.00, that interest on said bonds belonging to the said Chapin has been paid to September 1, 1911, and to no later date, and that there is now due and owing on account of said bonds to the said Chapin from the said Washington Steel & Bolt Company the sum of \$2,500.00, together with interest thereon at the rate of eight per cent (8%) per annum from the first day of September,

1911, making a total due to the said Chapin on this date of the sum of \$3,116.66.

11. IT IS FURTHER ORDERED, CONSIDERED, ADJUDGED and DECREED that Meta McElroy is the owner of the following bonds of said issue, to wit: bond numbered 700 of the par value of \$500.00, bond numbered 706 of the par value of \$1000.00, bonds numbered 439 to 442, each inclusive, being four bonds of the par value of \$100.00 each, making a total of \$400.00, and bond numbered 446 of the par [24] value of \$100.00, making a grand total of \$2,000.00, and that there is now due and owing from the said Washington Steel & Bolt Company to the said Meta McElroy, on account of the execution and delivery of the said bonds, the sum of \$2,000.00, together with the interest thereon at the rate of eight per cent (8%) per annum from the first day of September, 1911, making a total due to the said Meta McElroy on this date of the sum of \$2,493.33.

12. IT IS FURTHER ORDERED, ADJUDGED and DECREED that Thomas S. Burley is the owner of the following bonds of said issue, to wit: bonds numbered 443 to 445, each inclusive, being three bonds of the par value of \$100.00 each, totaling \$300.00 and bonds 498 to 500, each inclusive, being three bonds of the par value of \$100.00 each, totaling \$300.00, and bonds 701 and 717, being two bonds of the par value of \$1000.00 each, totaling \$2,000.00, making a grand total of \$2,600.00 par value, that interest has been paid upon said bonds to the first day of September, 1911, and to no later



date, and that there is now due and owing the said Burley from the said Washington Steel & Bolt Company, on account of the execution and delivery of the said bonds, the sum of \$2,600.00, with interest thereon, at the rate of eight per cent (8%) per annum from the first day of September, 1911, making the sum due at this date of \$3,241.33.

13. IT IS FURTHER ORDERED, ADJUDGED and DECREED that the bonds held by the Bank of Montreal, and particularly described in Paragraph 4 hereof, are hereby established as a valid, existing obligation of the said Washington Steel & Bolt Company and secured by that certain trust deed and mortgage hereinbefore held valid, signed by the Washington Steel & Bolt Company under date of September 1, 1908, and acknowledged under date of September 9, 1908, and recorded in the auditor's office of Snohomish County, State of Washington, in Volume 69, of Mortgages, at page 388, Record of Mortgages of said Snohomish County.

14. IT IS FURTHER ORDERED, ADJUDGED and DECREED THAT THE [25] bonds held by the Bank of Montreal, and particularly described in Paragraph 6 hereof, are hereby established as a valid, existing obligation of the said Washington Steel & Bolt Company and secured by that certain trust deed and mortgage hereinbefore held valid, signed by the Washington Steel & Bolt Company under date of September 1, 1908, and acknowledged under date of September 9, 1908, and recorded in the Auditor's office of Snohomish County, State of Washington, in Volume 69 of Mort-

gages, at page 388, Record of Mortgages of said Snohomish County.

15. IT IS FURTHER ORDERED, ADJUDGED and DECREED that the bonds held by J. H. Osborne, and particularly described in Paragraph 9 hereof, are hereby established as a valid, existing obligation of the said Washington Steel & Bolt Company and secured by that certain trust deed and mortgage hereinbefore held valid, signed by the Washington Steel & Bolt Company under date of September 1, 1908, and acknowledged under date of September 9, 1908, and recorded in the auditor's office of Snohomish County, State of Washington, in Volume 69 of Mortgages, at page 388, Record of Mortgages of said Snohomish County.

16. IT IS FURTHER ORDERED, ADJUDGED and DECREED that the bonds held by C. F. Chapin, and particularly described in Paragraph 10 hereof, are hereby established as a valid, existing obligation of the said Washington Steel & Bolt Company and secured by that certain trust deed and mortgage hereinbefore held valid, signed by the Washington Steel & Bolt Company under date of September 1, 1908, and acknowledged under date of September 9, 1908, and recorded in the Auditor's office of Snohomish County, State of Washington, in Volume 69 of Mortgages, at page 388, Record of Mortgages of said Snohomish County.

17. IT IS FURTHER ORDERED, ADJUDGED and DECREED that the bonds held by Meta McElroy, and particularly described in Paragraph 11 hereof, are hereby established as a valid,



existing [26] obligation of the said Washington Steel & Bolt Company and secured by that certain trust deed and mortgage hereinbefore held valid, signed by the Washington Steel & Bolt Company under date of September 1, 1908, and acknowledged under date of September 9, 1908, and recorded in the Auditor's office of Snohomish County, State of Washington, in Volume 69 of Mortgages, at page 388, Record of Mortgages of said Snohomish County.

18a. IT IS FURTHER ORDERED, ADJUDGED and DECREED that the bonds held by Thomas S. Burley, and particularly described in Paragraph 12 hereof, are hereby established as a valid, existing obligation of the said Washington Steel & Bolt Company and secured by that certain trust deed and mortgage hereinbefore held valid, signed by the Washington Steel & Bolt Company under date of September 1, 1908, and acknowledged under date of September 9, 1908, and recorded in the Auditor's office of Snohomish County, State of Washington, in Volume 69 of Mortgages, at page 388, Record of Mortgages of said Snohomish County.

18b. IT IS FURTHER ORDERED, CONSIDERED and ADJUDGED that the Trustee must elect whether he will administer the equity of redemption in the property for the benefit of general creditors or surrender the mortgaged property for foreclosure.

If the Court refuses to incorporate 18b in its order, we further, without prejudice to urging our right to have said paragraph inserted, propose the incorporation of the following:

19. IT IS FURTHER ORDERED, ADJUDGED and DECREED that the personal property referred to herein, particularly described as follows, to wit:

One Agax Hot Pressed nut machine 16 ton.

One Acme nut tapper 2.

One Acme nut tapper 1.

One alligator Shear.

One Acme heading and forging machine 1.

One Acme heading and forging machine 2.

One Acme threading machine 2.

One Acme threading machine 1.

One Acme pointing machine.

One 70 H. P. boiler Erie City manufacture.

One 60 H. P. engine.

\$6,000.00 worth of dies, in die houses on below described real estate. One burring machine. Water works, hose, electric light plant. A complete oil pumping station with heaters, double strainer, together with pipings and Rockwell oil burners for boiler, and also one three-ton tumbler. Blacksmithing outfit, such as vises, anvils, emery stands, tongs, hammers, drills, punches, etc. A-1 leather endless belting, and any other belting owned and used by said Washington Steel & Bolt Company in and about its said bolt factory. All pulleys owned by said Washington Steel & Bolt Company used in and about said bolt plant, all of the same being of steel material. All roller bearings for shaftings 120 feet or more long. All office furniture [27] and fixtures, among other things including desk, filing cabinet, typewriter, steam heating apparatus, situate and



being in the office of said company, which said office building is now located upon the above-described real estate.

Two hot blast furnaces. One oil tank, capacity 500 barrels. Platform scales. Also one United States patent known as the Climo Rail Joint Patent, #755848, issued on the 29th of March, 1904, together with all rights and privileges thereto connected or in anywise belonging also one United States Patent, #740257, known as the Owen-Shaw Nut and Bolt Locks, together with all rights and privileges thereto belonging.

And all other personal property of every name and nature now owned and possessed by the Washington Steel & Bolt Company except the cash which is in the hands of the Trustee in Bankruptcy as proceeds of the sale of certain manufactured stock and raw material.

And the real property herein referred to, situated in Snohomish County, State of Washington, and particularly described as follows:

“Beginning at the point of intersection of section line between sections twenty-three (23) and twenty-six (26), Township twenty-seven (27) North, Range Three (3) East of W. M., with the center line of the Great Northern Railroad right-of-way; thence angle west to south 48 degrees 46 minutes (magnetic course south 40 degrees 56 minutes west), along the center line of the Great Northern right of way, 339.5 feet; thence angle right 46 degrees 17 minutes a distance of 69.18 feet to the true place of beginning. Thence same course 395.8 feet. Thence angle

left 64 degrees 25 minutes, 290.58 feet; thence angle left 115 degrees 35 minutes 362.5 feet to the place of beginning, containing 2.004 acres, also all the abutting tide lands in front of the above described premises amounting to about six (6) acres, or about eight (8) acres in all, situated in the County of Snohomish, State of Washington."

"Beginning at a point on the westerly line of the right of way of the Seattle & Montana Railway Right of Way 952 feet south of the intersection of said Right of Way and the south line of Section Twenty-three (23) Township Twenty-seven (27) North Range Three (3) East and running thence north (250) two hundred fifty feet; thence S. 87 degrees 13' W. to the shore of Puget Sound. Thence southerly along the shore of Puget Sound to a point bearing S. 87 degrees 13' W. of the place of beginning; thence N. 87 degrees 13' E. to the place of beginning, being a strip of land 250 feet in length North and South along said Right of Way and extending to the shore of Puget Sound.

Also all that portion of the tideland Lot No. 1 in front of Section 26, Tp. 27, R. 3 E. in front of the town of Edmonds and more particularly described as follows: The first class tidelands lying in front of the following described upland: Beginning at a point on the westerly line of the right of way of the Seattle and Montana Railway Right of Way 952 feet south of the intersection of said Right of Way and the south line of Sec. 23, Tp. 27, N. R. 3 E. and running thence North 250 feet; thence south 87 degrees 13' W. to the shore of Puget Sound; thence southerly



along the shore of Puget Sound to a point bearing S. 87 degrees 13' W. from the place of beginning, thence N. 87 degrees 13' east to the place of beginning, being a strip of land 250 feet in length north and south along said right of way. Said portion of tideland Lot No. 1 being bounded by the Government Meander Line and the [28] river Harbor line and the N. and S. boundary line of above upland description produced out in the same direction to the river harbor line containing 0.99 acre more or less, according to the official map on file in the office of the Commissioner of Public Lands at Olympia, Washington," and all other real property or interest in real property which the said Washington Steel & Bolt Company owns, be sold by the Trustee in Bankruptcy in accordance with the practice of this Court, and that the proceeds of said sale shall be applied, first to such portion of the expenses in this bankruptcy proceeding as should be paid by the holders of the said bonds, then in payment of the proper charges of said Washington Trust Company, and then to the satisfaction of the bonds held by the Bank of Montreal to the extent of the indebtedness of the Washington Steel & Bolt Company as adjudged herein and to the payment and satisfaction of the bonds held by the said Osborne, Chapin, McElroy and Burley, paying proportionately on all valid bonds.

20. IT IS FURTHER ORDERED, CONSIDERED, ADJUDGED and DECREED that any balance remaining after the application of the proceeds of said sale, as set out in the preceding paragraph, shall be paid to A. McPhaden and A. G. Pike,

according to their respective interests in the bonds held by the Bank of Montreal.

21. IT IS FURTHER ORDERED, CONSIDERED, ADJUDGED and DECREED that any holder or holders of the bonds or coupons secured by this mortgage, according to the terms of this decree, if successful as bidder or bidders at said sale, may, after first paying in enough to cover all proper and lawful charges and demands which may be made by the Trustee, the Washington Trust Company, including its compensation and the compensation of its attorneys, and also paying in such portion of the expenses of this bankruptcy proceeding as should be paid by the holders of said bonds, use such bonds and coupons to apply toward the payment of the purchase money, reckoning and computing the said bonds and coupons at a sum equal to and not exceeding that which would be payable to such bond holder or holders as such out of the net proceeds of such sale if made [29] for cash.

22. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Washington Trust Company may, as trustee for the holders of said bonds, with their consent, after first paying in money sufficient to cover such portion of the expenses of this bankruptcy proceeding as should be paid by the bond holders, become a bidder at said sale and may use, in making settlement for and in payment of the purchase money to account to the Trustee in Bankruptcy, any and all of the bonds or coupons secured by said mortgage and held valid by this decree, and may use and apply the same in



and toward the payment of the purchase money reckoning and computing said bonds and coupons at a sum equal to and not exceeding that which would be payable out of the net proceeds of said sale, were the purchase price paid in cash, to the holders of such used bonds.

23. IT IS FURTHER ORDERED, ADJUDGED and DECREED, inasmuch as the proper portion of the expenses of this bankruptcy proceeding to be paid by the holders of the bonds is not ascertained, or fixed, that all bidders at said sale should be required to pay the sum of \$—— portion of the bid to cover any and all possible proper charges and expenses, and any amount remaining of said sum not used in the payment of proper charges and expenses shall be applied as other parts of the bid are directed to be applied according to the terms of this decree, and in the event that the successful bidder is someone other than the Washington Trust Company and a holder of bonds, such bidder shall pay in, at least, the sum of \$—— in cash to cover the lawful charges, including compensation and compensation of its attorneys, of the said Washington Trust Company.

Done in open court this —— day of October, 1914.

\_\_\_\_\_,  
Judge. [30]

The provisions of the foregoing Order or Decree were, at the time of the signing of the Order herein pertaining to this subject matter, separately presented to the Court, and a separate request was made as to each provision hereof, to have it embodied in

the Order, and that the Court considered separately each of the foregoing provisions and declined to embody each or any thereof in its Decree or Order and the attorney for the Washington Trust Company duly and at the time excepted to the Court's refusal so to do as to each paragraph and provision and excepted to the Court's refusal to embody paragraphs numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and his exceptions as to each paragraph or provision is hereby allowed.

Done in open court this 16th day of October, 1914.

JEREMIAH NETERER,

Judge. [31]

No. 4717.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY, a Corporation,

Bankrupt.

**Exhibit "F" [to Petition for Revision—Order Confirming Order of Referee of July 28, 1914, etc.].**

**ORDER ON REVIEW FROM REFEREE'S  
ORDER.**

This matter having been brought before the referee upon the petition of the Trustee for leave to sell the property of the bankrupt estate free and clear from the mortgage thereon; and the referee having made and entered an order on the 28th day of July, 1914, granting leave to the Trustee to so sell said property free and clear; and the Washington Trust



Company having taken a review from said order to this court; and the matters raised by said review having been heard and considered by this court,

IT IS ORDERED that said order of the referee be, and the same is, hereby confirmed.

And it is hereby further ORDERED that no bid for said property be accepted until its acceptance is authorized by this court.

Oct. 16, 1914.

JEREMIAH NETERER,

Judge. [32]

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*In the District Court of the United States in and for the Western District of Washington, Northern Division.*

No. —.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY, a Corporation,

Bankrupt.

**Exhibit "G" [to Petition for Revision—Exceptions of Washington Trust Co. to Order Confirming Order of Referee Re Sale of Property, etc.].**

**EXCEPTIONS.**

COMES NOW the Washington Trust Company, as Trustee, and hereby excepts to the Order entered by the above-entitled court this day wherein said court confirmed the Order of the Referee directing a sale of the property involved in the above-entitled proceeding, and further excepts to the whole and every part of said Order.

(Signed) JAMES B. MURPHY,  
Attorney for Washington Trust Company.

The foregoing Exception was duly presented and taken at that time of the signing of the Order herein referred to, and the exceptions allowed.

Dated this 16th day of October, 1914.

(Signed) JEREMIAH NETERER,  
Judge. [33]

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*In the United States Circuit Court of Appeals, Ninth  
District.*

No. 2512.

In the Matter of WASHINGTON STEEL & BOLT  
COMPANY, a Corporation,  
Bankrupt.

**Notice to Respondent on Revision.**

To EDWARD H. CHAVELLE, as Trustee of the  
Estate of the Above Bankrupt, and to J. W.  
RUSSELL, Attorney for the Said Trustee:

Please take notice that a petition for Supervision & Revision of the orders, judgments and proceedings rendered and had in the above-entitled cause and referred to in said petition, a copy of which is served on you herewith, has been filed and docketed in the United States Circuit Court of Appeals for the Ninth Circuit as cause No. 2512 and that you are required to answer, demur, plead, or move to dismiss the same within 30 days from the date of this Notice, or, in case of your default, the same may be granted and a mandate issued accordingly.



Dated this 24th day of November, 1914.

JAMES B. MURPHY,  
Attorney for Petitioner, the Washington Trust Com-  
pany.

I hereby acknowledge service of the above Notice,  
together with a copy of the petition referred to  
therein this 24 day of November, 1914.

J. W. RUSSELL,  
Attorney for Respondent, Trustee. [34]

[Endorsed]: No. 2512. In the United States Cir-  
cuit Court of Appeals, Ninth District. In the  
Matter of Washington Steel & Bolt Co., a Corpora-  
tion, Bankrupt. Notice of Petition for Supervision  
and Revision. Filed Dec. 1, 1914. F. D. Monckton,  
Clerk.

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[Endorsed]: No. 2512. United States Circuit  
Court of Appeals for the Ninth Circuit. The Wash-  
ington Trust Company, Petitioner, vs. Edward H.  
Chavelle, as Trustee of the Estate of Washington  
Steel & Bolt Company, a Corporation, Bankrupt, Re-  
spondent. Petition for Revision Under Section 24b  
of the Bankruptcy Act of Congress, Approved July  
1, 1898, to Revise, in Matter of Law, of Certain  
Orders of the United States District Court for the  
Western District of Washington, Northern Division.  
Filed November 4, 1914.

FRANK D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.

In the United States  
Circuit Court of Appeals  
for the Ninth Circuit

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THE WASHINGTON TRUST COMPANY,  
*Petitioner and Applicant,*

VS.

EDWARD H. CHAVELLE, as Trustee of the Es-  
tate of Washington Steel & Bolt Company, a  
Corporation, Bankrupt,  
*Respondent and Appellee.*

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PETITIONER'S AND APPELLANT'S (THE  
WASHINGTON TRUST CO.) BRIEF  
ON APPEAL.

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APPEAL FROM THE DISTRICT COURT OF  
THE UNITED STATES, FOR THE WEST-  
ERN DISTRICT OF WASHING-  
TON, NORTHERN DIVISION.

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DANSON, WILLIAMS & DANSON,  
JAMES B. MURPHY,  
CARL KINCAID,  
*Counsel for Petitioner and Appellant.*

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Filed

7-10-1915





In the United States  
Circuit Court of Appeals  
for the Ninth Circuit

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THE WASHINGTON TRUST COMPANY,  
*Petitioner and Applicant,*

vs.

EDWARD H. CHAVELLE, as Trustee of the Es-  
tate of Washington Steel & Bolt Company, a  
Corporation, Bankrupt,  
*Respondent and Appellee.*

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PETITIONER'S AND APPELLANT'S (THE  
WASHINGTON TRUST CO.) BRIEF  
ON APPEAL.

---

APPEAL FROM THE DISTRICT COURT OF  
THE UNITED STATES, FOR THE WEST-  
ERN DISTRICT OF WASHING-  
TON, NORTHERN DIVISION.

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STATEMENT OF CASE.

This is an appeal from two orders or decisions rendered on October 16, 1914, by the United States District Court for the Western District of Washington, Northern Division, sitting in bankruptcy, in one of which the said court decreed that certain first mortgage bonds of the Washington Steel &



Bolt Company, Bankrupt, were valid obligations against the said bankrupt, and certain other bonds were void and did not constitute an existing obligation against the said bankrupt estate, and in the other of the said two orders directed the trustee to sell the entire estate of the bankrupt free and clear of all incumbrances.

The evidence shows the following facts: (All references to pages refer to the printed record.)

The Washington Steel & Bolt Company, a private corporation, now bankrupt, when it was solvent and doing business, on or about and under the date of September 1, 1908, executed a bond issue totaling the sum of \$200,000.00, and under the same date (although its execution was not completed until September 9, 1908, as shown by the acknowledgment) the said Washington Steel & Bolt Company executed a trust deed of its real and personal property to the Washington Trust Company to secure the said bond issue. This trust deed was timely filed and recorded in the auditor's office of the proper county in this state. The issue consisted of a series of 750 bonds of different denominations. Each bond was in the form of a negotiable promissory note. It was made payable to the bearer or registered holder, and stated that it was one of a series of 750 like bonds, and that it was secured by the trust deed, and further stated that \$75,000.00 in amount of the bonds should be issued and placed upon the market upon the execution and delivery of the trust deed and the balance

should be placed upon the market at the direction of the trustees of the company. (Record, p. 283.) There was no limitation in the bonds as to the use of the money derived therefrom, and no limitation in the bonds as to the price for which they should be sold. Each bond further stated that it should pass by delivery. Each bond was signed by the officers of the company and bore the corporate seal of the company. Of this issue, \$62,000 in amount was certified by the Washington Trust Company, the trustee named in the deed, as to their authenticity, and negotiated by the company. The balance of the issue still remains in the hands of the Washington Trust Company as trustee.

The board of trustees of the mortgagor, in order to protect all bondholders and give credit to the bonds and assurance to those who might take them, passed a resolution on September 1, 1908, wherein it resolved that the mortgage should secure the payment of the principal and interest of said bonds equally and ratably without priority or distinction, irrespective of the date of issuance of the same, and further determined by said resolution and had incorporated in the trust deed that each of the bonds should be certified by the trustee, to-wit: the Washington Trust Company, and that such certificate should be conclusive proof that such bond was secured by said trust deed. (Exhibit 2, Trust deed, p. 282. Exhibit 27, Resolution of the Board of Trustees of September 1, 1908, p. 261.)

The Washington Steel & Bolt Company at the



time it was providing for these bonds was a young concern completing and extending its manufacturing plant, and needed money to meet pressing demands. There was some delay in issuing the bonds. Its President, A. McPhaden, to enable the said company to continue its work, advanced to it certain money. When the bonds were ready for market Mr. McPhaden took bonds in the sum of \$23,000.00 for this money he had advanced. While the bonds were silent upon the point, the mortgage provided that the bonds should not be sold for less than 95 cents on the dollar. The company had passed a resolution allowing a 5 per cent commission for selling the bonds. (Ex. 27.) In delivering bonds to Mr. McPhaden for the money advanced, the company allowed him to take them at 95 cents on the dollar, the minimum price, and also allowed a commission of 5 per cent, or what would be equivalent to a commission of 5 per cent had the bonds been sold direct to a third person. Mr. A. G. Pike, the secretary and manager of the company, had also advanced money in like manner, and for these advances he received bonds in the sum of \$2900.00. (pp. 182.) The bonds in each case were actually delivered by the company immediately upon their execution. These bonds were used by McPhaden and Pike as their property from that time forward. Mr. McPhaden, the president of the company, who had offices in Spokane, Washington, was the sole agent for the sale of the bonds. He received no salary as president, but pursuant to said

resolution was entitled to receive a 5 per cent commission for the sale of the bonds (pp. 179, 183). Finding it difficult to sell the bonds, he borrowed some money from certain friends and acquaintances and turned it in to the company, received bonds therefor and then paid his friends in bonds, which was one way of selling the bonds of the company (pp. 182). After the bonds were issued and while they were being thus disposed of by Mr. McPhaden for the company, he advanced the money thus procured to the company and received in lieu thereof bonds in the amount of \$11,000.00, which were delivered to him at 95 cents on the dollar, less 5 per cent selling commission, which, together with the \$23,000.00 in bonds he had previously received, made a total of \$34,100.00 issued to him or passing through his hands. (See testimony of McPhaden p. 183.) All these transactions took place soon after the bonds were issued.

All the bonds were certified by the Washington Trust Company from time to time and delivered to McPhaden at the request of the Washington Steel & Bolt Company, and upon receipt of copies of the minutes of the meetings of the Board of Trustees authorizing delivery. (See Exhibits 29, 30, 32, 34, 35, 36, pp. 266 et seq.)

Some time during March or April of 1909 (McPhaden did not remember just when) the Washington Steel & Bolt Company, being in need of money, sought to negotiate a loan of the Bank of Montreal at Spokane, Washington. The Bank of



Montreal refused to loan the amount sought unless the bonds were put up as collateral (p. 179). After some negotiation and the viewing of the plant at Edmonds, Snohomish County, Washington, the bank finally agreed to loan the company \$20,000.00. To obtain this loan from the Bank of Montreal the Washington Steel & Bolt Company procured four notes signed by McPhaden and Pike to it, totaling the sum of \$20,000.00, and procured from McPhaden \$20,000.00 of the bonds issued to him and from Pike \$2900.00 in bonds issued to him, and they were thus delivered and pledged to the Bank of Montreal as security for the loan (pp. 179 and 180). This money was paid by the Bank of Montreal to the Company at different times as its need required, and the notes and bonds were delivered to the Bank of Montreal on behalf of the company from time to time, as the money was advanced. The indebtedness to the Bank of Montreal has never been paid, and there is still due upon said indebtedness the sum of \$20,000.00, together with interest thereon at the rate of 8 per cent per annum, from the 23rd day of December, 1910 (p. 219). Both McPhaden and Pike are insolvent. All the money was loaned by the Bank of Montreal to the Washington Steel & Bolt Company, and all of said security was given by the said company to the Bank of Montreal under the agreement that the bank should be given this security for the money loaned. Every cent of the

money loaned was used by the company in its business (p. 190).

Shortly after March 20, 1911, the Washington Steel & Bolt Company, being in default in the interest due on the said loan, and having an overdraft with the bank, and to prevent action by the bank and induce it to grant an extension of the said loan, which was payable on demand, and the interest due thereon, pursuant to a resolution of its Board of Trustees, dated March 20, 1911, pledged \$25,000.00 of bonds with the bank in addition to those already pledged by McPhaden and Pike, individually, as collateral for the payment of the principal and interest of the loan. These bonds were delivered to the Bank of Montreal by the Washington Trust Company on an order given it by the Washington Steel & Bolt Company. (See Exhibits 37, 38, 39; pp.275, 276, 277 and p. 180 Record.)

These bonds came direct from the Washington Steel & Bolt Company, and are held as collateral to secure the payment of said indebtedness of \$20,000.00 and interest. The balance of the bonds obtained by McPhaden were disposed of to various persons, and the present holders of the bonds issued by the company are as follows:

C. F. Chapin -----	\$2,500.00
Meta McElroy -----	2,000.00
J. H. Osborne -----	7,000.00
Thos. S. Burley -----	2,600.00
Bank of Montreal -----	47,900.00
<hr/>	
Total -----	\$62,000.00



The bonds held by the Bank of Montreal are made up, as above stated, as follows:

Bonds of A. G. Pike-----	\$ 2,900.00
Bonds from McPhaden -----	20,000.00
Bonds received direct from the company as collateral security -----	25,000.00
Total -----	<u>\$47,900.00</u>

The outstanding bonds had attached interest coupons, the interest being payable semi-annually. Interest was paid upon all outstanding bonds, except those held by the Bank of Montreal, to March 1, 1911. The interest coupons becoming due September 1, 1911, were not paid. The interest on the bonds held by the Bank of Montreal was paid to September 1, 1910 (pp. 222, 223 and 219).

On or about September 13, 1911, the Washington Steel & Bolt Company was declared a bankrupt, and soon thereafter Edward H. Chavelle was appointed its trustee in bankruptcy. Default occurred in the payment of interest upon the bonds outstanding, and a cause of action was matured and the trust deed became subject to foreclosure. Upon the application and request of the holders of the bonds, the Washington Trust Company as trustee in said deed filed a petition in the bankruptcy proceedings in which it prayed for leave to foreclose its mortgage. Testimony was taken in support of this petition and the referee in bankruptcy, on December 19, 1912, granted the prayer of the petitioner, but imposed the condition that the

Washington Trust Company should pay into the registry of the bankruptcy court, for the defrayal of the expenses of the administration of the bankrupt's estate, the sum of \$1,200.00. The Washington Trust Company refused to comply with the condition imposed by the order of the referee and obtained a review of this order by the District Court. The District Court, upon review, vacated the order made by the said referee, and being of the opinion that if there was any question as to the validity of the trust deed or bonds such questions could be more easily and less expensively determined in the bankruptcy court, on the 3rd day of March, 1913, in its order referring the matter back to the referee, the court ordered that:

"And it is hereby further ordered that when such questions have been determined, the trustee must elect whether he will administer the equity of redemption for the benefit of the general creditors, provided said mortgage and bonds are held valid, or surrender the mortgaged property to the mortgagee for foreclosure."

This order was never appealed from but ever remained in full force and virtue.

The referee again heard the testimony and on May 15, 1913, filed an opinion in which he held that the validity of the mortgage and bonds had not been established by the evidence offered and on June 16, 1913, entered an order upon that finding denying the Washington Trust Company any relief and holding the bonds and mortgage null and void. The correctness of this order, upon the petition of the Washington Trust Company, was reviewed by



the District Court, and on September 22, 1913, the District Court rendered a memorandum opinion holding that the mortgage was a binding and valid lien upon all the real property of the bankrupt and upon a portion of the personal property, and holding it void as to the stock in trade upon the ground that permission was given in the mortgage to the mortgagor to sell this stock in the ordinary course of business without accounting to the mortgagee for the proceeds and expressed an opinion that all the bonds, concerning which testimony was offered, were binding obligations upon the company, but as the evidence was not clear as to the amount due upon these obligations, did not adjudicate their validity, and in accordance with the memorandum opinion, on the 14th day of February, 1913, the District Court entered a final order adjudging the mortgage valid and remanding the cause to the referee to take proof to ascertain the status of each of the bonds issued under the mortgage and the amount due and owing upon each of said bonds. (pp. 30, 39-52). Further testimony was taken and the referee again, on June 29, 1914, filed his report, which was not in the nature of Findings and Conclusions, upon the matters mentioned in the order remanding the cause, but rather an argument against the views upon the law expressed by the District Court in its memorandum decision holding the mortgage valid. The cause was again referred back to the referee with specific instructions to make Findings of Fact and Conclusions of

Law, and an order or judgment upon the same, and under date of July 20, 1914, the referee entered Findings of Fact, Conclusions of Law and a judgment holding all the bonds issued under the said mortgage void, rejecting the claim of the Washington Trust Company and expunging it from the list of claims upon record in the bankruptcy proceedings. The Findings of Fact and Conclusions of Law made by the referee appears in the record, but will not be set out here, as they are lengthy and because the District Court considered the testimony and passed upon the case *de novo* and without reference to the findings of fact of the referee, but suffice it to say here that the referee held all the bonds void in the hands of McPhaden and Pike and all subsequent holders (pp. 55 to 74 inclusive). Exceptions were duly taken to the Findings and Conclusions and Judgment of the referee.

There had also, prior to this hearing, been filed on behalf of the trustee in bankruptcy, a petition to sell this property free of all encumbrances and on the 28th day of July, 1914, eight days after the judgment was entered declaring the bonds void, the referee entered a judgment and order upon the same testimony which he had heard touching the validity of the mortgage, authorizing and directing the trustee in bankruptcy to sell the property for cash free of encumbrances. (See pp. 91 and 102.)

A petition to review the judgment entered on the 20th day of July, holding the bonds void, was duly filed and there was also filed a petition to re-



view the order of the referee directing a sale of the property for cash free of encumbrances. (See pp. 74 and 105.) These two petitions for review were considered by the District Court as one, were argued together and passed upon at the same time by the Judge of the District Court. The District Court would not take up, consider and pass upon separately the Findings, Conclusions and Decree of the Referee, and refused to make Findings himself, but perused and considered the testimony and rendered a memorandum decision thereon, and made only Findings of Fact as they were set forth in his opinion.

On September 15, 1914, he rendered an opinion upon the petition for review, in which he held that all the bonds, except \$25,000.00 held by the bank, were valid in the hands of the present holders. His views upon that point were clearly expressed in the following language in the opinion:

“From a consideration of all of the evidence presented, I am of the opinion that the \$23,400.00 of bonds issued to McPhaden, and the \$2,900.00 of bonds issued to Pike, issued for past indebtedness to Pike and McPherson for monies advanced by them to the corporation long prior to the date of the bonds, and transferred to the Bank of Montreal as collateral security for money paid to the company, are liabilities to the extent of the advances. There were also regularly issued: To C. F. Chapin, \$2,500.00; Meta McElroy, \$2,000.00; J. H. Osborne, \$5,900.00; and Thomas S. Burley, \$2,600.00. The bonds issued to these last named parties were upon considerations paid by these several parties to McPhaden, who paid that money to the Washington Steel & Bolt Company, which he was repre-

senting, and it was used by this company in the regular course of business, and all benefits arising from such payments accrued to the corporation. These several parties having thus paid their money upon the faith and credit of these bonds and the mortgage, should not now be deprived of the benefits accruing by reason of such security, after the corporation had used their money, some of which, perhaps, now representing some of the assets. The contention that the bonds are void because of the fact that a commission was paid to the person negotiating the bonds cannot be well founded as against the parties who paid ninety-five cents on the dollar, which the testimony shows these several parties did, except as to the bank holding the bonds issued to McPhaden and Pike as collateral security.

"The \$25,000.00 bonds issued to the Bank of Montreal as collateral security, I do not think are a valid claim. The bonds were delivered without any authority, either fact or law. There is no testimony before the court that the delivery of these bonds was ever authorized in a legal manner, and if a proper resolution had been passed, the authority under which the bonds were executed did not comprehend the issuance of bonds for any such purpose.

"I think the findings and conclusions of the referee should be modified in so far as they relate to the \$23,400.00 of bonds issued to McPhaden, and the bonds issued to C. F. Chapin, Meta McElroy, J. H. Osborne, Thomas S. Hurley and Pike. I think that the property should be sold, and the proceeds applied to the payment of the claims of the Bank of Montreal, to the extent of its interest in the McPhaden and Pike bonds held as collateral, and also the bonds of Chapin, McElroy, Osborne and Hurley, less such proportion of the expenses as should be paid by said interests in this bankruptcy proceeding, and the balance, if any, less expenses of administration, to be distributed among the gen-



eral creditors, as provided by the Bankruptcy Act.

“Let an order be presented.

“JEREMIAH NETERER, Judge.”

After the rendition of this opinion, the District Judge changed his views somewhat as to the law and became of the opinion that the bonds (\$23,000 to McPhaden and \$2,900 to Pike) were void in the hands of the original takers because they were negotiated for a sum less than 95 cents on the dollar, but that the \$11,100 in bonds afterwards acquired by McPhaden were valid obligations in the hands of McPhaden because he had paid therefor as the bonds were received, and also became of the opinion that the bonds were non-negotiable, and if void in the hands of the original takers were void in the hands of all subsequent purchasers. He undertook then, with little or no guide in the evidence, to find and hold valid the \$11,100 in bonds acquired by McPhaden and to find and hold void the remainder of the bonds issued, and later, on October 16, 1914, entered a judgment holding \$1,000 of the bonds held by Chapin and all the bonds held by McElroy and Osborne valid claims and secured by the mortgage and ordered the property sold and the proceeds applied to the payment of these bonds, and adjudged that the bonds held by the Bank of Montreal, \$1,500.00 of the bonds held by Chapin and all the bonds held by Thomas F. Burley were void and of no effect, and also upon the same day confirmed the order of the referee authorizing and directing a sale of the mortgaged

property for cash free of encumbrances. (See pp. 110 and 111.)

This appeal is taken from that part of the judgment rendered holding the bonds in the hands of the Bank of Montreal and Thomas F. Burley and \$1,500.00 of the bonds held by C. F. Chapin void, and from the order confirming the order of the referee directing a sale of the property free from encumbrances and denying the right of the persons whose bonds were held valid to use such bonds in answering their bid.

Our contentions in reference to the validity of the bonds are as follows:

#### I.

(a) That the bankrupt, regardless of the question of the negotiability of the bonds, is estopped from questioning the validity of the bonds first pledged to the Bank of Montreal, because the bankrupt itself procured the pledge of these bonds for a loan of \$20,000.00, which it received and the fruits of which it has used and retained.

(b) That the \$25,000.00 in bonds later acquired as additional collateral by the Bank of Montreal are valid, because, in addition to the reasons set forth by us as sustaining the validity of all the bonds, the bankrupt was not prohibited from pledging its bonds as additional security for an existing indebtedness and at the same time restraining a foreclosure on the mortgage and covering an overdraft with the bank. They were pledged in the ordinary course of business, more than four months



prior to the filing of the petition in bankruptcy, and therefore could not be questioned by the trustee.

(r) The bonds held by Chapin and Burley are valid because they were duly and regularly issued, paid for, were negotiable and were in the hands of innocent purchasers for value.

## II.

That the court erred in confirming the order of the sale of the property for cash before the validity of the mortgage bonds was finally determined, and in refusing to adopt provisions 21 and 22 of a proposed decree, which permitted the bondholders or the Washington Trust Company, as trustee for the bondholders, after first paying in sufficient money to cover such portion of the costs of the bankruptcy proceedings as should be borne by the bondholders, to use their bonds in answering bids made by them for the mortgaged property.

## III.

That the court erred in undertaking itself to foreclose a mortgage and direct a sale of the property and in not requiring the trustee to elect whether he would administer upon the equity of redemption for the benefit of general creditors or surrender the mortgaged property to the mortgagee for foreclosure.

## SPECIFICATIONS OF ERRORS.

### I.

The District Court of the United States for the Western District of Washington, Northern Division, erred in holding that the bonds amounting to \$22,-

900.00 held by the Bank of Montreal and taken by it as security for the payment of the loan made to the Washington Steel & Bolt Company, at the time of the making of said loan, void, and in refusing to hold each of said bonds valid and secured by the trust deed given for that purpose. The said court further erred in refusing to adopt Paragraph IV of the provisions for decree proposed by the Washington Trust Company.

## II.

The said court erred in holding that the bonds of the Washington Steel & Bolt Company afterwards taken by the Bank of Montreal, amounting to the par value of \$25,000.00, were void, and in refusing to hold the same valid and in refusing to adopt as part of its decree or order Paragraph VI of the proposed provisions of the Washington Trust Company.

## III.

The said court erred in holding \$1,500.00 par value of the bonds of the Washington Steel & Bolt Company held by C. F. Chapin void and of no effect, and in failing and refusing to hold the said bonds valid and in failing and refusing to adopt Paragraph X of the provisions for decree proposed by the Washington Trust Company.

## IV.

The said court erred in holding in effect that the bonds of the Washington Steel & Bolt Company held by Thomas F. Burley were null and void and in failing and refusing to hold the said



bonds amounting to the par value of \$2,600.00 valid, and in failing and refusing to adopt and incorporate in its decree Paragraph XII proposed by the Washington Trust Company as an appropriate part of the order of said court.

#### V.

The said court erred in ordering and directing a sale of the property of the Washington Steel & Bolt Company, and in refusing the bond holders of the said company the right or privilege to use in bidding for said property their bonds in proportion to the net amount of the proceeds of said sale which would ultimately be turned back to any bondholder as a bidder at said sale, and in failing and refusing to adopt Paragraph XXI of the provisions for decree proposed by the Washington Trust Company.

#### VI.

The said court erred in refusing to grant the Washington Trust Company leave to foreclose its mortgage according to the prayer of its petition, and in refusing to require the trustee in bankruptcy, after the mortgage was held valid, to elect whether he would administer upon the equity of redemption of the property covered by said mortgage for the benefit of general creditors, or surrender the property for mortgage foreclosure.

#### VII.

The said court erred in the order entered October 16, 1914, in directing that there should be deducted from the proceeds of the sale such propor-

tion of the expenses and costs as should be paid by the interests represented by the Washington Trust Company.

### VIII.

The said court erred in refusing to sustain the exceptions of the Washington Trust Company to the order entered by the referee on the 28th day of July, 1914, and erred in confirming said order.

### IX.

The said court erred in holding in its final order certain of the bonds invalid and void, which it pronounced valid in its memorandum opinion.

### X.

The said court erred in refusing to specifically or at all sustain exception No. 1 of the Washington Trust Company to the referee's report and findings.

### XI.

The said court erred in refusing specifically, or at all, sustain exception No. 2 of the Washington Trust Company to the referee's report and findings.

### XII.

The said court erred in refusing to specifically, or at all, sustain exception No. 3 of the Washington Trust Company to the referee's report and findings.

### XIII.

The said court erred in refusing to specifically, or at all, sustain exception No. 4 of the Washington Trust Company to the referee's report and findings.



## XIV.

The said court erred in refusing to specifically, or at all, sustain exception No. 5 of the Washington Trust Company to the referee's report and findings.

## XV.

The said court erred in refusing to specifically, or at all, sustain exception No. 6 of the Washington Trust Company to the referee's report and findings.

## XVI.

The said court erred in refusing to specifically, or at all, sustain exception No. 7 of the Washington Trust Company to the referee's report and findings.

## XVII.

The said court erred in refusing to specifically, or at all, sustain exception No. 8 of the Washington Trust Company to the referee's report and findings.

## XVIII.

The said court erred in refusing to specifically, or at all, sustain exception No. 9 of the Washington Trust Company to the referee's report and findings.

## XIX.

The said court erred in refusing to specifically, or at all, sustain exception No. 10 of the Washington Trust Company to the referee's report and findings.

## XX.

The said court erred in refusing to specifically, or at all, sustain exception No. 11 of the Washing-

ton Trust Company to the referee's report and findings.

### XXI.

The said court erred in refusing to specifically, or at all, sustain exception No. 12 of the Washington Trust Company to the referee's report and findings.

### XXII.

The said court erred in refusing to specifically, or at all, sustain exception No. 13 of the Washington Trust Company to the referee's report and findings.

### XXIII.

The said court erred in refusing to specifically, or at all, sustain exception No. 14 of the Washington Trust Company to the referee's report and findings.

### XXIV.

The said court erred in refusing to specifically, or at all, sustain exception No. 15 of the Washington Trust Company to the referee's report and findings.

### XXV.

The said court erred in refusing to specifically, or at all, sustain exception No. 16 of the Washington Trust Company to the referee's report and findings.

### XXVI.

The said court erred in refusing to specifically, or at all, sustain exception No. 17 of the Washington Trust Company to the referee's report and findings.



## XXVII.

The said court erred in refusing to specifically, or at all, sustain exception No. 18 of the Washington Trust Company to the referee's report and findings.

## XXVIII.

The said court erred in refusing to specifically, or at all, sustain exception No. 19 of the Washington Trust Company to the referee's report and findings.

## XXIX.

The said court erred in refusing to specifically, or at all, sustain exception No. 20 of the Washington Trust Company to the referee's report and findings.

## XXX.

The said court erred in refusing to specifically, or at all, sustain exception No. 21 of the Washington Trust Company to the referee's report and findings.

## XXXI.

The said court erred in refusing to specifically, or at all, sustain exception No. 22 of the Washington Trust Company to the referee's report and findings.

## XXXII.

the said court erred in failing and refusing to specifically, or at all, sustain the first ground of error assigned by the Washington Trust Company in its petition for review, upon which the District Court passed in rendering its said decision.

## XXXIII.

The said court erred in failing and refusing to specifically, or at all, sustain the second ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

## XXXIV.

The said court erred in failing and refusing to specifically, or at all, sustain the third ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

## XXXV.

The said court erred in failing and refusing to specifically, or at all, sustain the fourth ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

## XXXVI.

The said court erred in failing and refusing to specifically, or at all, sustain the fifth ground of error assigned by the Washington Trust Company in its ePtition for Review, upon which the District Court passed in rendering its said decision.

## XXXVII.

The said court erred in failing and refusing to specifically, or at all, sustain the sixth ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the



District Court passed in rendering its said decision.

### XXXVIII.

The said court erred in failing and refusing to specifically, or at all, sustain the seventh ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

### XXXIX.

The said court erred in failing and refusing to specifically, or at all, sustain the eighth ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

### XL.

The said court erred in failing and refusing to specifically, or at all, sustain the ninth ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

### XLI.

The said court erred in failing and refusing to specifically, or at all, sustain the tenth ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

### XLII.

The said court erred in failing and refusing

to specifically, or at all, sustain the eleventh ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

#### XLIII.

The said court erred in failing and refusing to specifically, or at all, sustain the twelfth ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

#### XLIV.

The said court erred in failing and refusing to specifically, or at all, sustain the thirteenth ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

#### XLV.

The said court erred in failing and refusing to specifically, or at all, sustain the fourteenth ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

#### XLVI.

The said court erred in failing and refusing to specifically, or at all, sustain the fifteenth ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the



District Court passed in rendering its said decision.

XLVII.

The said court erred in failing and refusing to specifically or at all sustain the sixteenth ground of error assigned by the Washington Trust Company in its petition for Review, upon which the District Court passed in rendering its said decision.

XLVIII.

The said court erred in failing and refusing to specifically, or at all, sustain the seventeenth ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

XLIX.

The said court erred in failing and refusing to specifically, or at all, sustain the eighteenth ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

L.

The said court erred in failing and refusing to specifically, or at all, sustain the nineteenth ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

LI.

The said court erred in failing and refusing to

specifically, or at all, sustain the twentieth ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

## LII.

The said court erred in failing and refusing to specifically, or at all, sustain the twenty-first ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

## LIII.

The said court erred in failing and refusing to specifically, or at all, sustain the twenty-second ground of error assigned by the Washington Trust Company in its Petition of Review, upon which the cision.

## LIV.

The said court erred in failing and refusing to specifically, or at all, sustain the twenty-third ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said de-

## LV.

The said court erred in failing and refusing to specifically, or at all, sustain the twenty-fourth ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.



## LVI.

The said court erred in failing and refusing to specifically, or at all, sustain the twenty-fifth ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

## LVII.

The said court erred in failing and refusing to specifically, or at all, sustain the twenty-sixth ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

## LVIII.

The said court erred in failing and refusing to specifically, or at all, sustain the twenty-seventh ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

## LIX.

The said court erred in failing and refusing to specifically, or at all, sustain the twenty-eighth ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

## LX.

The said court erred in failing and refusing to specifically, or at all, sustain the twenty-ninth

ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

#### LXI.

The said court erred in failing and refusing to specifically, or at all, sustain the thirtieth ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

#### LXII.

The said court erred in failing and refusing to specifically, or at all, sustain the thirty-first ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

#### LXIII.

The said court erred in failing and refusing to specifically, or at all, sustain the thirty-second ground of error assigned by the Washington Trust Company in its Petition for Review, upon which the District Court passed in rendering its said decision.

#### LXIV.

The said court erred in refusing to incorporate in its said order and decree upon review Paragraph I of the provisions requested by the Washington Trust Company to be incorporated in the order or decree of the court.



## LXV.

The said court erred in refusing to incorporate in its said order and decree upon review Paragraph II of the provisions requested by the Washington Trust Company to be incorporated in the order or decree of the court.

## LXVI.

The said court erred in refusing to adopt Paragraph III of said provisions.

## LXVII.

The said court erred in refusing to adopt Paragraph V of said provisions.

## LXVIII.

The said court erred in refusing to adopt Paragraph VII of said provisions.

## LXIX.

The said court erred in refusing to adopt Paragraph VIII of said provisions.

## LXX.

The said court erred in refusing to adopt Paragraph XIII of said provisions.

## LXXI.

The said court erred in refusing to adopt Paragraph XIV of said provisions.

## LXXII.

The said court erred in refusing to adopt Paragraph XVI of said provisions.

## LXXIII.

The said court erred in refusing to adopt Paragraph XVIII of said provisions.

## LXXIV.

The said court erred in refusing to adopt Paragraph XIX of said provisions.

## LXXV.

The said court erred in directing a sale of the said lands and premises before the validity of the said bonds was finally passed upon and determined, and in failing to suspend the sale until the prosecution of an appeal might be had from its judgment.

## LXXVI.

The said court erred in confirming the order entered July 28, 1914, permitting and directing the sale of the property of said bankrupt.

## LXXVII.

The said court erred in confirming in part the report, Findings, Conclusions and Judgment of the Referee entered July 20, 1914.

### EXPLANATION OF SPECIFICATIONS OF ERROR.

The referee made a number of Findings of Fact and a number of Conclusions of Law. Exceptions were filed to practically all of these Findings, in many cases, because of inaccuracies. In the petition for review there were enumerated and set out the errors alleged to have been committed by the referee. These specifications in the petition for review were directed to the same errors to which the exceptions to the Findings and Conclusions and order of the referee were directed. The District Court would not take up and consider and pass upon, separately, the exceptions taken



to the Findings of Fact, Conclusions of Law and order of the referee, and refused to consider, separately the errors charged in the petition for review, but went direct to the testimony and considered the case *de novo*. It also refused to make Findings of Fact and Conclusions of Law, but rendered a judgment holding certain bonds valid and others invalid. To get before the District Court in a concrete and definite way the decree provisions for which it contended, the Washington Trust Company proposed a decree containing provisions in reference to the bonds of each particular holder so that any taint existing against the bonds of one holder would not be imparted any other bonds. Written exceptions were taken to the parts of the decree of the District Court which we contend were erroneous and also a separate exception was taken to the court's refusal to adopt each provision in the proposed decree. These last exceptions sought, of course, to preserve the same points that were raised by the exceptions addressed to the report of the referee and also the same points which were set forth in the petition for review. Out of an abundance of precaution, and at the expense of repetition, we have separately claimed, in our specifications of errors set forth above, as error the court's refusal to sustain each of our exceptions to the referee's report, also his refusal to sustain each of the grounds set out in the petition for review as well as and in addition thereto specification of errors based upon the action of the District Judge in dealing with the subject

matter of the suit so that many of the specifications of error set forth above seek to correct the same mistake, and in our argument we will group together the specifications of error which point to the same subject matter.

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### ARGUMENT.

#### \$22,900. BONDS HELD BY BANK OF MONTREAL.

The specifications of error raising the question of the validity of the bonds first acquired by the Bank of Montreal amounting to the sum of \$22,900. are as follows: 1, 12, 13, 15, 16, 19, 23, 24, 26, 27, 29, 66, 67, 70, 71, 74.

These specifications cover the errors claimed to have been made by the referee and brought to the District Court by petition for review, the errors claimed to have been made by the court in refusing to specifically and separately consider and sustain such exceptions, the court's ruling upon these bonds independent of the exceptions and *de novo* from a review of the testimony and to the court's refusal to adopt the provisions of the decree proposed by the Washington Trust Company. They all, however, relate to the one question, the validity of these bonds, especially in the hands of the Bank of Montreal. The court held these bonds, void. The proposed decree on this point can be found in the Record page 115.

Under this heading we will discuss only the features peculiar to these bonds in the hands of the



Bank of Montreal, and will leave the remainder of the argument and points which pertain to these and other bonds to be discussed under another heading.

In addition to the facts appearing in the opening statement we may add: That the evidence in regard to these bonds shows that the Washington Steel & Bolt Company was short of funds and needed money, and on April 30, 1909, at a meeting of its Board of Directors, duly called, the majority of the board passed a resolution (1) constituting the Bank of Montreal as the depository for the company's funds and transferring its banking business to that bank, (2) authorizing its President, McPhaden, and its Treasurer, Pike, to negotiate such loan as they deemed necessary to further the interests of the company (See Exhibit 31, p. 268). In March or April of 1909 (McPhaden does not remember just when) McPhaden, the President of the Washington Steel & Bolt Company went to the Bank of Montreal to see if he could not negotiate a loan. As the manager of the bank, at that time Mr. Buchanan, (who died before these proceedings were started, p. 220 Record), wanted to know the conditions of the company and the bonds outstanding, McPhaden explained to him the number of the bonds that were out and by whom they were owned. The Bank refused to make the loan unless the bonds were put up as security. McPhaden and Pike agreed that their bonds might be put up as collateral, and the manager of the Bank, after going

to Edmonds to see the plant, agreed to advance the Washington Steel & Bolt Company \$20,000 as a loan, taking \$22,900 in bonds as security and other security which the evidence shows to be worthless.

On May 1, 1909, the bank advanced the company \$10,000; on May 11, 1909, \$5,000; on June 16, 1909, \$2,500 and on July 28, 1909, \$2,500, making a total of \$20,000 (See Exhibits 22, 23, 24 and 25 and pp. 219 and 232 Record). The loan was made directly to the Washington Steel & Bolt Company and every cent was used and spent by the Company in its business. (See testimony of McPhaden p. 178 and Ambrose p. 218). The journal and cash book of the company were identified by Barbour, the book-keeper, and introduced in evidence. They show the dates on which these various amounts were received by the Washington Steel & Bolt Company from the bank, and further show that all of this amount was expended by the company. (See testimony of Barbour p. 189 and 190.) The transaction was had in the ordinary course of business of the bank and the money was loaned only upon the faith of the bonds as collateral security. The Washington Steel & Bolt Company not only passed a resolution through its Board of Directors authorizing the President and Secretary to negotiate the loan, but it later ratified the loan and acknowledged it by authorizing the placing of \$25,000 of its own bonds as collateral to the loan by the resolution of its Board of Directors on March 20, 1911 (See Exhibit 37). The loan was regular in



all respects and there is not a shred of evidence in the record to the contrary, nor is it denied by the trustee in bankruptcy that the Washington Steel & Bolt Company received the money and used it for its corporate purposes.

Of these \$22,900 bonds, \$20,000 belonged to McPhaden individually and \$2,900 to Pike. They were later presented by the bank to the Washington Trust Company and registered in the name of the bank. (See testimony of Webster p. 221.)

We urged in view of this state of facts that it would be contrary to good faith and common justice to permit the bankrupt to challenge the validity of these bonds after it had, through its officers, used them in the procurement of money amounting to practically the par value of the bonds. In this case there can be no question but the bonds passed into the hands of bona fide purchasers for value, who acted upon the faith of representations made by the bankrupt itself. In so offering the bonds and borrowing money thereon the company represented them valuable as securities and should now be estopped from denying it. Were the rule otherwise, it would afford opportunity for the perpetration of the grossest frauds. It might be argued by the respondent and appellee that the bonds in question went from McPhaden indirect to the Bank. It is true that the bonds were McPhaden's and Pike's bonds, but this would not charge the rule. The money was procured for the bankrupt. It was paid by the bank direct to the bankrupt. The bankrupt

received it and expended the money in the ordinary course of its business, and in procuring this money it offered the bonds of McPhaden and Pike as security. That McPhaden was willing that his bonds should be offered would seem immaterial. Another reason why the bankrupt should not be permitted to impeach these bonds, if we were to concede that McPhaden had not a good title, is that when the company transferred the apparent absolute ownership of the bonds to McPhaden, with the apparent power to dispose of them, and stood by, and received money from a third party which is paid in good faith and in reliance on such title the company is estopped from asserting that McPhaden had no title as against this innocent third party. This reasoning would apply whether the bonds in question were negotiable instruments or merely choses in action or even chattels. Another reason why the bankrupt should not be permitted now to question the validity of these bonds in the hands of the Bank of Montreal is that the facts in this case present a proper case for the application of the legal maximum that where one of two innocent parties must sustain a loss by reason of fraud or infirmity of title, such loss shall fall upon the one, if either, whose act has permitted such fraud or who was a party to such infirmity. If there be infirmity or irregularity in the title of these bonds the parties who produced such are the bankrupt itself and MsPhaden, who, together, by



the use of these bonds, procured the money from the present holder.

There is another rule which is equally applicable and sufficient to protect these securities in the hands of the Bank of Montreal, and that is that where there must be a loss (but we are not conceding in this case that the bankrupt will be a loser) through fraud or infirmity, in title, the person who is most free from fault will be protected and the loss must fall upon the persons at fault. It cannot be said in this case that the Bank of Montreal was, in any sense, at fault or that its action in any way assisted to produce the infirmities which the court below found in these bonds and by reason of which they were held invalid.

In the case of *Orleans vs. Platt*, 99 U. S. 676, 25 L. Ed. 404 the court thus states the rule:

“There was a familiar principle applied by the Supreme Court in that case, which has a much stronger application in this, because the town on account of recitals in the bonds can hardly be considered an innocent party; that, where one of two innocent persons must suffer a loss, and one of them has contributed to produce it, the law throws the burden upon him, and not upon the other party. *Hern vs. Nichols*, 1 Salk, 289; *Merchants’ Nat. Bank vs. State Nat. Bank*, 10 Wall 604, 19 L. Ed. 1008.”

This court applied, *in re Raymond Box Co. et al. State Bank vs. Coats*, 205 Fed. 618, the rule that where money is received and used for the benefit of a corporation by its executive officers who are also its trustees, the corporation ratifies the con-

tract under which the money was paid and is estopped from denying the authority of its officers to make it. This case is also authority for the following rule, taken from the syllabus:

“2. Persons dealing with corporate agencies have the right to rely upon the apparent authority of those in charge of the corporate business, and for acts done within the scope of that authority the corporation is bound.”

These two principles there announced equally well apply to the facts in the case before the court. The bonds were the contracts of the company, and they were used by the corporate agencies of the company who had apparent authority to use them and the corporation received the benefits of the contract. These rules announced by this court in the above case are also sustained by the authority of this state.

*Kinkade vs. Witherop*, 29 Wash. 10, 69 Pac. 399.

*Kirwin vs. Wash. Match Co.*, 37 Wash. 285, 79 Pac. 928.

*Kirsch vs. Interstate Fisheries*, 39 Wash. 381, 81 Pac. 855.

*Parker vs. Hill*, 68 Wash. 134, 146, 122 Pac. 618, 623.

The question of negotiability and the question of the equities claimed to have existed apply alike to these and other bonds, and will be discussed elsewhere in the brief.



BONDS HELD BY BANK OF MONTREAL IN  
THE SUM OF \$25,000. PLEDGED AS  
ADDITIONAL SECURITY.

The specifications of error addressed to these bonds are 2, 3, 18, 19, 24, 25, 26, 27, 28, 29, 68 and 69.

As we have stated before interest having become due and being unpaid on the loan, and an overdraft existing, the bank, feeling that it was not sufficiently secured, required more security and the bankrupt (Record, p. 275) pursuant to a resolution duly passed by the Board of Trustees, and certified and deposited with the bank bonds in the sum of \$25,0000 as collateral security to that loan, in addition to those pledged by McPhaden and Pike, individually. The court below held these bonds void for the reason, as assigned by the court, that they were delivered without authority of the bankrupt, and contrary to the purpose for which they were intended.

We urge that these reasons are not founded upon the evidence nor consistent with the law applicable. The minute book of the corporation had been stolen (pp. 192 and 193). A true copy of the minute book had been made up, or procured, and was in the possession of the bankrupt at the time the trustee was appointed (p. 193). At the time of the trial, the bankrupt refused to produce it, and it could not be found (p. 192), and secondary evidence was offered to show the action upon this point and shows that the resolution passed by the

Board of Directors authorizing the delivery of \$25,000 of these bonds as additional security to the Bank of Montreal was passed March 20, 1911, and bears the signature of five of the trustees of the corporation who acted at that time. (See Exhibit 37, Record p. 275.) At that time interest had remained unpaid upon the loan since March 1, 1910, and the interest upon the bonds became due and unpaid on March 1, 1911, twenty days before the delivery of this additional security. The evidence shows that Hadley, acting for Gunn, who was attempting to reorganize the company and put it on its feet, paid the bank interest due from March 1, 1910 up to September 23, 1910, after the company went into bankruptcy. (See pp. 227 to 231 inclusive.) So that these bonds were pledged with the bank, not only as additional collateral security to the loan but to secure an extension of time on the interest due on the notes in the hands of the bank, as well as interest upon the bonds already held by them and to further secure an overdraft of the company.

We contend that this resolution was duly and regularly passed by the Board of Directors. The court at one time held these bonds valid. (See pp. 48 and 49 Record.) It is true that two of the directors whose names appear upon the resolution were not present at the meeting but at least three of them, a majority, were present at the time it was passed. W. R. Ammon, one of the trustees, testifies in the first part of his testimony on direct



examination by the trustee in bankruptcy that he signed the resolution of March 20th in the office of the company at Edmonds but that Pike was not present when he signed it, and that the board sitting as a board did not pass the resolution (p. 204). But on being cross-examined, he states that he remembers very little about it; that he never signed any statement purporting to be a resolution that was false, to trick the Bank of Montreal or anyone else; that he never signed anything blindly not knowing about it, and that as a matter of fact he does not remember very much about what he did as an officer of the company (pp. 205 and 206). The resolution itself (exhibit 37, p. 275) recites that the meeting was regularly called on notice, and that Ammon, Hall and Pike were present; that the motion was put by Pike and seconded by Hall and carried, and that the motion was put by Pike to send a copy of the minutes to Crosford and Ready for their consideration (they not being present). Ammon testified that there were five directors at this time (p. 205), and to the same effect in the testimony of Pike (p. 195), and to the same effect is the testimony of Hall (p. 210). Hall testified that the trustees in Edmonds, which is a small town, saw each other constantly, almost daily and discussed the matters of the company; that he never signed a resolution which had not been discussed between them, the trustees Pike, Ammon, and himself, and that had been agreed upon that it was the best thing for the company; that on the

occasion on which he signed the resolution of March 20th Amomn was there, but he "did not think Mr. Pike was there"; but that this was several years ago and that he kept no record of it; that he could recall going to a meeting, but could not say what meeting it was; that he did not to his knowledge subscribe to any resolution which was false, that sometimes resolutions after a meeting at the office would be written up and sent to them to sign or ratify what they voted at the meeting (pp. 209 to 214). Pike testifies that both he, Ammon and Hall were present at the meeting; that Hall had a quick cali over the telephone, an obsteteric case, and left before the minutes were reduced to writing and the resolution was taken up to his house that night to sign; that Mr. Hall seconded the motion; that the minutes were ordinarily written up after the meetings were held and after they were written up they were sent around to have the signatures of the trustees; that as secretary of the company he always endeavored to incorporate in the minutes just what happened at the meetings pp. 195 and 196). The testimony of Pike is more definite than that of Ammon and Hall, who seemingly remembered very little of what took place. It was natural that Pike's memory should be better as he was the secretary of the company, and was more interested in its affairs than either of the other two.

The resolution on its face shows that it was regularly drawn up. Faith and credit were given to it by the Washington Trust Company, which de-



livered the \$25,000 of bonds to the bank on the authority of this resolution, and the bank accepted them in good faith and gave the company all the benefit which it sought by the placing of this additional security.

There is always a legal presumption that the acts of a board of directors or trustees are regular until the contrary is shown. The general rule is that the thing required to be done was done as required. *Thompson Corporations*, (2nd Ed.) Sec. 1163 and cases cited by the author.) Failure to make a record of the proceedings at the time does not invalidate them. Indeed, it has been held that no record at all need be made of the proceedings at a corporate meeting, unless expressly required, and, if there is no record, they may be proved by parol. (*Clark and Marshall "Private Corporations*, Sec. 650.) See also *In re Raymond Box Co. et al*, 205 Fed. 618.

"The failure to enter in the books of the corporation, at the time it was adopted, a resolution increasing the amount of the capital stock, does not affect the validity of the increase, as such corporate acts may be proved as well by parol as by written evidence. (*Handley et al. vs. Stutz*, 139 U. S. 417, 11 Sup. Ct. Rep. 530, taken from the syllabus.)

This, it seems to us, disposes of the question of the authority of the officers to deliver the bonds to the Bank of Montreal. This fact was once affirmatively found by the court (pp. 48 and 49).

Neither the bonds nor the mortgage limit the purpose for which they were issued. The provision

touching that point is, "Whereas, the Board of Trustees of the Washington Steel & Bolt Company, deeming it advisable and to the best interests of said company, and being fully empowered by the bylaws of the said Washington Steel & Bolt Company, and acting pursuant thereto, at a meeting duly held for that purpose, on the date hereof, has resolved and determined that for the purposes of promoting the larger success of the said Washington Steel & Bolt Company, that the borrowing of Two Hundred Thousand Dollars (\$200,000.00) was necessary and to the best interests of the company as aforesaid, and that such sum be borrowed for it in its behalf and name by the officers and by due action of the trustees (p. 280).

The company was not prohibited from using its bonds as a pledge, and therefore could make such use of them, as the best interests of the company might require. This point was well considered in the case of *in re National Boat & Engine Company, Butterfield vs. Woodman*, 216 Fed. 208, and resolved against the position taken by the district judge. In that case, as in this, bonds of the company were pledged as additional security and the court, in passing upon that point, says:

"There is a stipulation that these bonds for \$32,000 were delivered by the officers of the National Boat & Engine Company as collateral security for the debts of Mrs. McCracken and the two banks. The trustee contends that the transfer of these bonds was without consideration; that they were deposited with the banks and with Mrs. McCracken as additional security on antecedent debts,



namely upon the original notes on which Butterfield was liable as indorser; that they were deposited, not for the purpose of furnishing additional capital to the company, or to assist in the purchase of manufacturing products; that their transfer was without authority, and in fraud of the rights of stockholders.

“The proofs show that the bonds were delivered to creditors of the Racine Boat Manufacturing Company more than six months before the bankruptcy of the National Boat & Engine Company, in order to give security to those creditors. If the physical possession of the pledge had been left with the debtor, the burden of proof would have been upon the trustee in bankruptcy. *Barr vs. Reitz*, 53 Pa. 256; *Taney vs. Penn. Bank*, 232 U. S. 174, 181, 34, Sup. Ct. 288, 58 L. Ed. But here the transaction was completed. The creditors have not received the protection from the bonds to which they are entitled. No action is shown in behalf of the National Boat & Engine Company to limit its obligations in so transferring bonds for the protection of the creditors of the old company, whose property had been absorbed by the National Boat & Engine Company. I think *Mary E. McCracken*, the National Lumbermen’s Bank, and the Hackley National Bank are entitled to the security of the \$32,000 of bonds of the National Boat & Engine Company. The testimony fails to satisfy me that the pledging of the bonds was for any fraudulent purpose. I sustain the claim of the petitioner. I give him the benefit of the security of these bonds to a dividend out of the proceeds of the assets covered by the lien of the Astor Trust Company mortgage.”

In the case of *Curtis vs. Leavitt et al.*, 15 N. Y. 9, the court in its opinion on p. 197, says:

“The contest in the present case is between creditors of the corporation, to whom the twenty-four bonds in question have been pledged as se-

curity for a preexisting debt, and the receiver of the corporation, appointed subsequent to the pledge, and representing the corporation, its stockholders and general creditors: the precise case within all the cases, where a preexisting debt is a valuable consideration for a sale or mortgage made in good faith. I conclude, therefore, that Holford & Co., as pledgees of the twenty-four bonds and purchasers for a valuable consideration, within the eighth section of the title in relation to moneyed corporations."

In the case of *Duncomb et al vs. The New York H. & N. R. R. Co. et al.*, 88 N. Y. 1, the court held that a railroad corporation may pledge its bonds as security for a precedent debt for moneys advanced by the president for the construction or operation of its road.

In *Rawlings vs. New Memphis Gaslight Co.*, 105 Tenn. 268, 60 S. W. 206, it was held that the act of pledging bonds to secure an advance of moneys for the use of the corporation, or to quiet its preexisting creditors, or to secure its accommodation indorsers was not an act *ultra vires*.

In this case the bonds of the company were used as collateral to paper of the company, which had been used sometime prior to raise money for betterments.

The court cites the following cases:

*Guano Co. vs. Hunt*, 100 Tenn. 89, 42 S. W. 482.

*Baxter vs. Washburn*, 8 Lea 15.

*Hunt vs. New Memphis Gaslight Co.*, 95 Tenn. 136, 31 S. W. 1006.

*Sanford Fork and Tool Co. vs. Howe*, 157 U. S. 312, 15 Sup. Ct. 621.



The last case above cited was somewhat similar to the facts in the present case. There a comparatively young corporation required large sums of money to enable it to carry on its business, and to obtain this executed its 10 promissory notes for \$69,000 which notes were endorsed by six directors and stockholders of the company. All the money received from these notes went directly into the company. As the notes thus endorsed began to mature the directors found that the company could not meet them, and the company, at a meeting of its stockholders, authorized a mortgage to be executed to secure any new indebtedness that might be incurred or the renewal or extension of any present indebtedness or liability of the corporation.

This was clearly an execution of a mortgage to secure a pre-existing indebtedness and the court held it a valid execution of the powers of a private active corporation.

In the case of *Hunt vs. New Memphis, supra*, the bonds were pledged to secure preexisting debts due the directors of the company. Held not to be *ultra vires*.

Other cases in point are:

*Chick vs. Fuller*, 114 Fed. 22, 51 C. C. A. 648.

*Coler vs. Allen*, 9th Circuit, 114 Fed. 609, 52 C. C. A. 389.

*Damarin vs. Iron Co.*, 47 Ohio St. 581, 26 N. E. 37.

*Gould vs. Little Rock, etc.*, 52 Fed. 680.

The latter is mentioned approvingly in *Sutton Mfg. Co. vs. Hutchinson*, 63 Fed. 496; 11 C. C. A. 320. The case is exactly in point, except that in the present case the corporation was a going concern and in no way insolvent at the time additional security was given, while in that case the company was in failing circumstances.

The following authorities also sustain view that a valid pledge of bonds may be made for the antecedent debt of a corporation:

*Thompson Corp.* (2nd Ed.) Sec. 2301.

*Lehman Bros. vs. Tallahassee, etc.*, 64 Ala. 567.

*Grand Rapids, etc. vs. Sanders*, 54 How. Pr. (N. Y.) 214.

*Regents etc. Iron Works Co., In re* 45 L. J. Ch. 620.

The weight of authority is to effect that a corporation may pledge its bonds for a debt that is less than the face value of the bonds.

*Thompson Corp.* (2nd Ed.) Sec. 2301.

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THE BONDS AMOUNTING TO \$1,500 OF C. F. CHAPIN AND THE BONDS HELD BY THOS. F. BURLEY REJECTED BY THE COURT AS VOID, AND ALSO THE PRECEDING BONDS HELD BY THE BANK OF MONTREAL.

Many of the principles of law noticed under this heading are applicable, and we contend should be applied also to the bonds held by the Bank of Montreal, but as they pertain to all the bonds



alike we discuss them here to avoid repetition, and in doing so, we will, of course, discuss the assignments of error before pointed out. The specifications of error, particularly referring to the validity of the bonds of C. F. Chapin are 3, 17, 23, 24, 26, 27, 28, 29 and 72. The specifications of error specifically referring to the bonds held by Thos. F. Burley are 4, 17, 23, 24, 27, 28 and 29. The court rejected these bonds because it believed that they constituted a part of the \$23,000 in bonds first issued to McPhaden. The reasons assigned by the court for the rejection of these bonds is that they were for a past consideration and sold for 90c on the dollar.

The evidence shows that C. F. Chapin purchased first \$1,500 of bonds from McPhaden shortly after they were issued in 1908, and paid McPhaden \$1,350 for them, being 90 per cent of their par value. On April 2, 1909, he purchased two \$500 bonds of E. M. Gallant in a transaction in which he considered he paid par value. (See p. 214.) Chapin therefore held \$2,500 of the bonds, \$1,000 only of which have been held good. Thos. S. Burley purchased his \$2,600 of bonds from McPhaden, also shortly after they were issued in 1908. (P. 175.) Meta McElroy (Mrs. Siewart) purchased \$1,500 of the bonds held by her from McPhaden, on September 26, 1908, shortly after they were issued. She later purchased \$500 of bonds from L. R. Van de Bogart, on June 16, 1909, making a total of \$2,000 (p. 217 and Exhibits 7

and 8, p.— Record). Jacob H. Osborne purchased his \$7,000 from McPhaden sometime in the fall of 1909 (p. 226). Interest was paid by the company upon the bonds held by these parties up to March 1, 1911, since which date no interest has been paid (pp. 223 and 224).

We believe there can be no contention made on the evidence in this case that either the Bank of Montreal, C. F. Chapin or Thos. S. Burley had any actual knowledge or notice of the provisions of the trust deed, or that they had any actual notice of the fact that the bonds netted the company but 90c on the dollar, nor do we think that any claim can be made that these bonds were not acquired by these people in the ordinary course of business for value, without notice, and if they are negotiable bonds, these parties took them free of all equitable defenses.

Our contentions in regard to the bonds held by these parties are:

FIRST: That the bonds were negotiable and hence passed free of all equities or defenses.

SECOND: That no equities or defenses existed against them which would defeat their enforcement, even if non-negotiable.

THIRD: That the company is estopped from challenging their validity in the hands of the present holders.



THE BONDS ARE NEGOTIABLE AND HENCE  
TAKEN FREE OF ALL EQUITABLE  
DEFENSES.

We contend here, as we contended in the court below, that the bonds in question are negotiable bonds. We set out in the opening statement the features showing that each bond was a solemn admission of indebtedness under the seal of the company, bearing all the insignia of negotiable commercial paper, and each bond was one of a series which was intended to be sold in the markets of the world, so we are not dealing in this case with a single obligation between two individuals, nor an isolated bond of a corporation executed to secure the performance of a contract, or do some specific act, but it is a case of a corporation issuing 750 bonds totaling in amount the sum of \$200,000 for the express purpose, as stated in the bonds themselves, of putting them on the market for sale to the public in order to raise money. The District Court was of the opinion that the bonds were negotiable and that the bankrupt should not be permitted to set up, as against innocent purchasers for value, any infirmity that might have existed as against the original holder. The opinion of the district judge in this respect was changed, however, by the rendering of an opinion by the State Supreme Court in the case of *Bright vs. Offield*, 143 Pac. 159. The court held in that case that a note requiring the maker to pay taxes upon the note itself and the mortgaged property which secured

the note was not negotiable because it did not conform to Sec. 3392 of the State Code, which requires that a promissory note, to be negotiable, must be an unconditional promise or order to pay a sum certain in money, entertaining a view that the covenant to pay taxes rendered the amount to be paid uncertain. In that case it was an isolated note and not one of a general bond issue, and second, the note in that case required, by the construction placed upon it by the State Court, the maker to pay all taxes which might be assessed against the note and the property securing the note, while in the present case the bonds in question are members of a series intended to be negotiated, and sold in markets distant from the place of record of the mortgage and contain no clause requiring the maker of the bonds to pay taxes upon the bonds themselves or the debt represented thereby. By reference to the language of the bond, it will be seen that the provision in reference to taxes is as follows, "All payments upon this bond, both principal and interest, shall be made without any deduction for any tax or taxes that said Washington Steel & Bolt Company may be required to pay or to retain therefrom by any present or future laws of the United States of America or of the State of Washington, said Washington Steel & Bolt Company hereby covenanting and agreeing to pay any and all such taxes."

By observing this provision it will be seen that there is no covenant that the maker of the bonds is required to pay taxes on the bonds themselves.



This tax would naturally be assessed against and paid by the holder of the bonds, in the event of any tax being levied on the bonds. The Washington Steel & Bolt Company simply agrees not to withhold from the owners of the bonds sums which it may be legally required to pay. It agrees to pay any tax which the government or the state may impose upon it, the Washington Steel & Bolt Company, or may require the company to retain when the bonds are paid, should there by chance be any such requirement. It does not agree to pay any taxes which may be imposed upon the various holders of these bonds or upon the bonds. The paper goes forth burdened with no such agreement. The agreement or promise could have been omitted and the same obligation would have rested upon the corporation. But whether in or out, the promise in no way increases, diminishes or modifies the amount to be paid on the bond, which at all times remains certain and fixed. It in no way varies, increases or diminishes the conditions of the obligation of the parties. The stipulation is mere surplusage and should be treated as such. You might say it was a gratuitous expression on the part of the Washington Steel & Bolt Company to do that which the law already obligated it to do.

In the case of *Murray vs. Charleston*, 96 U. S. 432, 24 L. Ed. 716, the City of Charleston attempted to retain out of the interest due on its city bonds a certain percentage, representing taxes due on personal property and the Supreme Court of the United

States denied it the right to retain any amount whatsoever on account of the bonds or the interest due hereon.

To do that which the law already requires or obligates one to do is not an additional obligation or liability. Suppose the note read otherwise and stated that the Washington Steel & Bolt Company would pay the amount named therein less payments which it may be required to make for taxes or to retain therefrom by any present or future law, this language would in that event have rendered the amount of the bond uncertain. In fact the agreement or the assurances that it will not withhold any such sums adds to the certainty of the amount rather than detracting from it. But it is our contention that it does neither. Suppose that the company failed or refused to pay any taxes assessed against it, the company, would this in any way accelerate the maturity of the note? There is no such condition in the bond. Would the happening of that event give any holder of the bond a right of action of any nature against the company? The obligation is to pay the state or the government. No action thereon accrues to the holder of the bond.

The rule is that if the additional stipulation does not change the promise from one to pay the sum absolutely, and at all events, and is independent of that obligation, and does not change the nature of the conditions of the contract, or accelerate the



maturity of the note, it will not render it non-negotiable.

*Cherry vs. Sprague*, 187 Mass. 113, 67 L. R. A. 33.

*Hotchkiss vs. Nat. Shoe & Leather Bank*, 21 Wall 354; 22 L. Ed. 645.

In the case of *Bright vs. Offield*, *supra*, relied upon by respondent and appellee, there was inserted a promise to pay taxes on the mortgaged property securing the note, and taxes on the note itself, with the condition that in the event of the maker's permitting the taxes to become delinquent the entire amount should become due and payable. The court held that both the amount and date of payment were uncertain. The two cases are entirely different. The amount due and the date of payment in the Offield case were based upon certain contingencies, which made both the amount and date uncertain. The note in that case further provided, "if the maker \* \* \* shall do any act whereby the value of said property shall be impaired" the whole amount shall at once become due and payable and the mortgagee may proceed at once to collect the note and foreclose the mortgage. The bonds in the present case go forth burdened with no such conditions or contingencies. In the Offield case the transaction was an isolated note, where as in the present case the bond is one of a series of bonds intended to be placed upon the market precisely for negotiable purposes. It bears all of the essential requisities of negotiability. It

contains an unconditional promise to pay a sum certain in money. It is made payable to bearer, or in case it is registered to the registered holder thereof. Both the principal and interest due thereon is payable at a fixed future time, and it is in writing and signed by the maker. The stipulation in question in no way varies, alters, or modifies in the slightest the above requisities of negotiability.

Whatever may be the holding in the Offield case, *supra*, this court is in no way bound by that decision. In the case of *Swift vs. Tyson*, 16 Peters 1; 10 L. Ed. 865, the Supreme Court of the United States holds that in questions of general commercial law the state tribunals "cannot furnish positive rules or conclusive authority, by which our own judgments are to be bound up and governed. The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield in *Luke vs. Lyde* (2 Burr R. 883) to be in a great measure not the law of a single country only, but of the commercial world."

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THERE WERE NO EQUITABLE DEFENSES  
SHOWN TO EXIST AGAINST THESE  
BONDS, WHICH WOULD DEFEAT THEIR  
ENFORCEMENT EVEN IF NON-NEGO-  
TIABLE.

If this court should conclude that the bonds are non-negotiable and subject to the equitable defenses on behalf of the maker, we urge that they are still valid obligations. The court below held the



bonds void because it was of the opinion that they were issued by the maker for the past consideration and sold at 90c on the dollar, which was below the minimum price named in the mortgage. We urge upon the court that the testimony does not warrant the trial court in reaching the conclusion that the bonds were issued for a past consideration. Both McPhaden and Pike were paying money into the company to meet its needs, expecting the bonds to be issued, and it was not necessary for the money and bonds to pass at the same amount. If it were conceded that the bonds were delivered to McPhaden and Pike in the first instance for a past consideration, it cannot be urged against the present holder, the Bank of Montreal, because as between the company and the bank there was a present passing consideration. It advanced money upon the faith and credit of the bonds as collateral. But conceding, for the purpose of argument, that the consideration between the bankrupt and the original holder of these bonds was a past consideration, it was still a sufficient consideration for the passing of the bonds:

Sec. 3416 of Vol. 2 of Rem. & Bal. Ann. Codes and Statutes of the State of Washington reads as follows:

"Sec. 3416. Value, what constitutes. Value is any consideration sufficient to support a simple contract. An antecedent or preexisting debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time." (L'99 p. 346, Sec. 25.) This statute was in

force at the time of the execution of the bonds in question.

Our own state court, as well as courts generally, has held a past consideration sufficient:

*Spencer vs. Alki Point Transportation Co.*,  
53 Wash. 77, 101 Pac. 509, 131 Amer. St.  
R. 1053.

See also 7 Cyc. 696, 705.

Neither does the fact that the bonds were delivered for 90c upon the dollar render them void. The company admits receiving 90c on the dollar for these bonds from the original holder, and it obtained \$20,000 in addition from the Bank of Montreal upon the faith of the bonds first delivered to it, and yet the company has the affront to come into a court of equity and urge as a complete defense, against the holders of the bonds, that it received no adequate consideration therefor.

The resolution of the Board of Directors of September 1, 1908, authorized the allowance of a commission of 5 per cent of the face value of the bonds to any agent, officer or trustee of the company purchasing or selling any of the said bonds, and further approved the accounts of McPhaden and Pike with the Washington Steel & Bolt Company and directed that the trustee he instructed to deliver them bonds at a discount of 5 per cent and allowing them a commission of 5 per cent for selling them. (Exhibit 27.) (See also Exhibits 28, 29 and 31.)

The testimony clearly shows that both McPhedan and Pike were allowed for the taking of



these bonds the same commission which the company would have been required to pay had the bonds been sold to strangers through them, and the cases are uniform in holding that deductions from the minimum price fixed for the sale of bonds, for commissions, costs of printing, traveling expenses or other expenses incident to the sale of the bonds are legitimate and proper deductions therefrom. The courts recognize, as they must, that it costs money to sell bonds whether it is paid in the way of commissions or in the way of salary, or under the guise of incidental expenses, and this does not invalidate the bonds. If the court, however, should reach the conclusion that these officers should not be entitled to a commission of 5 per cent or to a discount of 10 per cent upon the bonds, it is not a defense under the statutes of this state, or the rule laid down by the Supreme Court of this state, but it is only a *pro tante* defense, and even the original holders would be entitled to a judgment against the company for the amount which they paid for the bonds with interest thereon.

Sec. 3419 Vol. 2 Rem. & Bal. Anno. Codes and Stat. of Wash., reads:

"Sec. 3419. Lack of consideration as a defense, absence or failure of consideration is matter of defense as against any person not a holder in due course; a partial failure of consideration is a defense *pro tanto*, whether the failure to ascertained and liquidated amount or otherwise." (L'99, p. 346, Sec. 28).

*Bayview Brewing Co. vs. Techlenberg*, 19 Wash. 469, 53 Pac. 724.

*Hansen vs. Thomplins*, 2 Wash. 508, 27 Pac. 73.

In the case of *Kinkade vs. Witherop*, 29 Wash. 10, 69 Pac. 399, is found a case very similar to the one at bar, and the court holds that the bonds which were given in payment of contractor's claim at the rate of 90c on the dollar were valid. To show the similarity of that case to this, we quote from page 17 as follows:

"These bonds the appellant claims were illegally issued, and do not constitute an indebtedness of the district. The objections urged against them are that there was no consideration for their issue, that they were not paid for in cash, that they provided for the payment of more interest than the statute permitted, and that they are not negotiable in form. That the bonds were issued to Costello for an indebtedness of \$18,300 actually due him from the district abundantly appears from the record, and we cannot see how it can be said that there was no consideration for their issue. If the statute contemplated or required a sale for cash, we think the transaction between the parties amounted to that. The bonds had been contracted to Clough & Graves and were to be delivered to them when they paid to the district the purchase price agreed upon. If Costello had paid Clough & Graves \$18,300 for the \$20,000 worth of bonds received by him, and Clough & Graves had paid this sum to the district, and the district had again paid it out to Costello, the transaction would have been admittedly legal. But the actual transaction between the parties amounted to that. Costello had a right to purchase the bonds from Clough & Graves. Clough & Graves owed the district and the district owed Costello. If the parties chose to satisfy these mutual obligations by transferring the bonds, certainly it was not necessary to the legality of the



transaction that they actually pass the money between them."

These statutes and the above decisions seem to resolve the matter of consideration, whether the court finds that it is past or partial, in favor of the appellant.

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### ESTOPPEL.

We next contend that the bankrupt is estopped from interposing defenses to the bonds in question, which it seeks to interpose, and this estoppel applies to all the bonds alike. This contention, we assume, would be useful to us only in the event that this court should hold the bonds to be non-negotiable instruments. Much that we have said bearing upon this point concerning the bonds held by the Bank of Montreal is applicable to all other bonds, and much that is said here is applicable to those bonds.

With the substance of the bonds in mind, as shown by the opening statement, it must be conceded that if the bonds are not negotiable it is because of their technical wording and not because they were so designed or dealt with, and the hidden technicality is such as would not have been discovered by the ordinary dealer in bonds. The bonds have all the appearances of negotiable paper and passed by delivery. Further, the Washington Steel & Bolt Company, in closing each bond witnesses upon its face that it was signed and executed and the corporate seal affixed, "pursuant to legal authority in them vested to that end." The mortgage

is pregnant with recitals of corporate action fully justifying the issuance of the bonds. In this form the bonds were given out and sold to investors for money or other valuable consideration. The purchasers of these bonds registered their holdings without complaint being made, and the company issuing the bonds, in recognition of their liability thereon, paid at least two years interest.

Even if there were fatal equities, which we do not concede, existing between McPhaden and the bankrupt, they should not avail against the present holders of the bonds. These bonds, although they be held not technically negotiable, have acquired in the course of business custom a semi-negotiable character. The bankrupt, in passing the bonds to McPhaden, conferred upon him the apparent absolute ownership with apparent power to sell and convey a good title, and we believe the rule to be that where the owner of non-negotiable commercial paper has assigned or delivered it to another in the method commonly employed by all mercantile communities for such transfers, or in the method stated upon the face of the instruments for such transfer, he thereby clothes such other with such apparent insignia of title and complete ownership as will estop him as owner from setting up equities against purchasers in good faith for value. That is, such a person cannot, in an action upon such securities, urge the fact that the title was not absolute and perfect in the person to whom the securities had been thus assigned or delivered. If this were not so,



a corporation would be afforded a convenient way of escape in all cases where its own negligence or carelessness or unbusinesslike dealing with its internal affairs had misled others into the purchase of its own securities.

Aside from but kindred to the matter of estoppel we urge that the trustee in bankruptcy is in this action going counter to the well known principle that one cannot plead his own wrong to relieve himself from the obligation of an executed contract whose benefits he has retained, and also the rule that he who comes into equity must come in with clean hands and he who seeks equity must do equity.

In the case of *Sioux City Terminal R. & W. Co. vs. Trust Co. of N. A.*, 82 Fed. 124; 27 C. C. A. 73, the court, in its syllabus, says:

"A mortgage given by a corporation to secure a debt in excess of the amount of indebtedness which it had power under the statute to contract is binding on the corporation and its subsequent creditors, where the corporation has received the full consideration for the debt secured, and the transactions were free from fraud."

"After a corporation has negotiated and received the proceeds of bonds secured by a mortgage executed by its officers, sealed with its corporate seal, and reciting that it was executed by authority of the corporation, both the corporation and its subsequent creditors are estopped from denying the validity of the mortgage because its execution was not authorized by a proper resolution of its Board of Directors."

In discussing facts similar to the one at bar the court in that case (p. 134), says:

"The corporation does not offer to return the moneys which it received upon this mortgage, but seeks to retain all its benefits and to repudiate all its burdens. It will be soon enough for the chancellor to stay his hands from the enforcement of these contracts and soon enough for him to set them aside, when the corporation returns to the complainant the moneys it received upon them. Until then, good faith, justice, and equity demand their enforcement. A man cannot plead his own wrong to relieve himself from the obligations of an executed contract whose benefits he retains," and further, after a view of the authorities the court concludes as follows:

"These decisions do not rest upon the principle of estoppel, nor depend upon the creditors' ignorance of the excessive indebtedness. They stand upon the rule that he who seeks equity must do equity, and upon the principle that one may not at any time accept the benefits and repudiate the burdens of his contracts."

In the case of *Wright vs. Hughes*, 12 Amer. St. Rep. 412 (119 Ind. 324), the court, in dealing with a mortgage given by a corporation to secure the payment of money, announced the doctrine as follows:

"It is not equitable to ask a court of conscience to avoid a mortgage given to secure borrowed money without offering to return the money which has been received. Having received the full benefit of the contract, it would now be a glaring injustice to allow those representing the corporation to set it aside and retain the benefit by sustaining their contention that the loan was *ultra vires*; especially as this doctrine only concerns the corporation in its relations with the state and with its stockholders, and is never entertained where it will injure innocent third persons: *Bissel vs. Michigan Southern, Etc. R. R. Co.*, 22 N. Y. 258."



In the case of the *First Nat. Bank of Hailey vs. G. V. B. Min. Co.*, 89 Fed. 439, the doctrine is announced as follows, quoting from syllabus:

“Where the chief officers of a corporation are in reality its owners, holding nearly all of its stock, and are permitted to manage the business by the directors, who are only interested nominally or to a small extent and are controlled entirely by the officers, the acts of such officers are binding on the corporation, which cannot escape liability as to third persons dealing with it in good faith on the pretense that such acts were *ultra vires*.”

In the case of *Bensiek vs. Thomas*, 66 Fed. 104, the court says on page 110 of its opinion, as follows:

“In the case of *Plank-Road Co. vs. Murray*, 15 Ill. 336, the facts were that the directors of the company had borrowed money without authority, and had given a mortgage upon the company's property to secure it. It was held that, inasmuch as the company had received the money, and used it, it was estopped from questioning the authority of the officers who had made the loan. Also, in *Troup's Case*, 29 Beav. 353, 357, it was decided by the master of the rolls that, when the directors of a company have no power to borrow money, a person lending money to the company cannot enforce payment of it against the company, unless it has been *bona fide* applied to the purposes of the company, but that, if so applied, a recovery against the company may be had.”

We have not set forth the facts in these cases from which quotations are made because the quotations refer particularly to a doctrine which we ask be applied to the facts in this case. The corporation borrowed money here, has not returned it, has

not offered to return it, but retains all the benefits of the transaction, and yet seeks to repudiate it.

The following cases also support our contention:

*Pittsburg C. C. & L. Ry. Co. vs. Lynde*, 44 N. E. 596; 55 Ohio St. 23; 172 U. S. 493.

*Ind. & Ill. Cent. Ry. Co. vs. Sprague*, 103 U. S. 756; 26 L. Ed. 554.

*City of Antonio vs. Mehaffy*, 96 U. S. 316, 24 L. Ed. 816.

In the case of *Pittsburg C. C. & St. L. Ry. Co. vs. Lynde*, the opinion discloses that Benj. E. Smith was president of the company issuing bonds and as such president he had the custody of the bond issue. Without knowledge or consent of, or authority from the Board of Trustees and without consideration moving to the company Smith negotiated and pledged certain of the bonds, for his private use. It was claimed that the bonds which were thus pledged were not negotiable instruments and did carry with them protection to innocent purchasers for value. The court, in dealing with the matter and treating it independently of the question whether or not the bonds were negotiable, said:

“Independently of the rule of law designed to protect and give currency to negotiable paper, those principles of natural justice universally applicable to the affairs of mankind, when applied to this transaction, would seem to demand the protection of the defendant in error as against the maker of the bonds and all who stand in its shoes. He was wholly free from fault in connection with the transaction. Each bond contained a declaration of its transmissibility from hand to hand by mere de-



livery. He found them for sale before they were due in the market where such securities are usually offered for sale and bought them at their fair market value, without notice of any infirmity in their title. Soon thereafter he took them to the Union Trust Company, in New York City, the agents of the maker especially appointed to register its bonds, and caused them to be registered in his name on its books. What more could even the highest degree of prudence or diligence demand of him? On the other hand, the maker of the bonds, a railway company, capable of acting through agents only, placed these bonds in the custody of its president, an agent clothed with high, though possibly not clearly defined, powers. The bonds were perfect obligations, bearing on their face a certificate of authentication by the trustee, and containing an express declaration of their transmissibility from hand to hand by mere delivery. He was, up to and long after the time these bonds were negotiated, continued as president of the different consolidated companies as they were successively formed. The companies thus held him out to the world as one who could be trusted to transact matters of importance. Under these circumstances, what can be found tending to excite a doubt in the most cautious mind respecting his power to dispose of bonds so intrusted to him? If the maker of these bonds and those who must abide by their title can shift the responsibility and consequent loss resulting from this transaction from themselves to the holder of the bonds, it must be by the application of some stern rule of law founded upon considerations of public policy."

In *Ind. & Cent. Ry. Co. vs. Sprague*, *supra*, the supreme court of the United States says:

"The bonds for the payment of money with interest warrants attached are everywhere encouraged as safe and convenient mediums for the settlement of balances among the mercantile men and any course of judicial decisions calculated to re-

strain or impede their free and unembarrassed circulation would be contrary to the soundest principles of public policy."

Guided by this principle, the Supreme Court protected bonds in the hands of an innocent purchaser who took them from the president of the company issuing the bonds, although the president did not own the bonds and had no authority to dispose of them.

In the case of *City of Antonio vs. Mehaffy* there was involved city warrants or certificates. The city was sued upon these certificates by an innocent purchaser for value. The city defended upon the ground that it had no statutory authority to issue such certificates, and that they were not negotiable. The court in passing upon the question said:

"The city is estopped by the recital on the face of the securities to deny its verity. A *bona fide* purchaser had a right to regard it as true, and was not bound to look further. *Comrs. vs. Aspinwall*, 21 How. 539 (62 U. S. XVI., 208); *Mercer Co. vs. Hacket*, 1 Wall. 83 (68 U. S. XXI., 548); *Grand Chute vs. Winegar*, 15 Wall. 355 (82 U. S. XXI., 170); *San Antonio vs. Gould* (*supra*)."

"The principal securities delivered to the company were not bonds, because they were unsealed; but this is immaterial. The twelfth section, under which they were issued, expressly declared that those charged with the duty of subscribing "May issue bonds bearing interest, or otherwise pledge the faith of the city."

"The securities issued were within the latter category. If that clause were wanting, we should have no difficulty in holding that the city was, under the circumstances, estopped from denying their validity. The doctrine of *ultra vires*, whether invoked



for or against a corporation, is not favored in the law. It should never be applied where it will defeat the ends of justice, if such a result can be avoided. *Whatney Arms Co. vs. Barlow*, 63 N. Y. 62.

In the case of *Wesson vs. Town of Mt. Vernon*, 98 Fed. 804-808, the court, in quoting on the question of estoppel from *Hackett vs. Ottawa*, 99 U. S. 86, and other decisions, says as follows:

"The bonds in suit, by their recital of the titles of the ordinances under which they were issued, in effect assured the purchaser that they were to be used for municipal purposes, with the previous sanction, duly given, of a majority of the legal voters of the city. If he would have been bound, under some circumstances, to take notice, at his peril, of the provisions of the ordinances, he was relieved from any responsibility or duty in that regard by reason of the representation, upon the face of the bonds, that the ordinance under which they were issued were ordinances "providing for a loan for municipal purposes." Such a representation by the constituted authorities of the city, under its corporate seal, would naturally avert suspicion of bad faith upon their part, and induce the purchaser to omit an examination of the ordinances themselves. It was, substantially, a declaration by the city, with the consent of a majority of its legal voters, that purchasers need not examine the ordinances, since their title indicated a loan for municipal purposes. The city is therefore estopped, by its own representations, to say, as against a *bona fide* holder of the bonds, that they were not issued or used for municipal or corporate purposes. It can not now be heard, as against him, to dispute their validity. Had the bonds, upon their face, made no reference whatever to the charter of the city, or recited only those provisions which empow-

ered the council to borrow money upon the credit of the city, and to issue bonds therefor, the liability of the city to him could not be questioned. Much less can it be questioned, in view of the additional recital in the bonds, that they were issued in pursuance of an ordinance providing for a loan for municipal purposes; that is, for purposes authorized by its charter. *Supervisors vs. Schenck*, 5 Wall. 772, 18 L. Ed. 556. It would be the grossest injustice, and in conflict with all the past utterances of this court, to permit the city, having power under some circumstances to issue negotiable securities, to escape liability upon the ground of the falsity of its own representations, made through official agents, and under its corporate seal, as to the purposes with which these bonds were issued. Whether such representations were made inadvertently, or with the intention, by the use of inaccurate titles of ordinances, to avert inquiry as to the real object in issuing the bonds, and thereby facilitate their negotiation in the money markets of the country, in either case the city, both upon principle and authority, is cut off from any such defense."

In the case of *Dorain, Admx. vs. City of Chreveport*, 28 Fed. 287, the court, upon the question of estoppel says (Syllabus) :

"Under the power vested by statute in a municipal corporation whereby it may contract for the making of public improvements and issuance of bond the payment for the work performed, a bond was issued for work actually done, becomes a voucher or evidence of indebtedness to that extent and may be recovered upon by the assignee in good faith even though such corporation had never been specifically empowered to issue negotiable paper."

On page 290 the court further says:

"If the ordinance in this case seems to leave something to be effected by suppleemntal ordinances the city alone was able to supply them. Indeed,



the law would be a trap for unwary creditors if she is allowed, in this case, to enjoy all the advantages of her errors, and the plaintiff to be visited by all of the destruction. If the bonds are treated as commercial instruments, the statute (section 2448), would not affect their validity, because the city would be estopped by the recitals in the securities. She would not be allowed to deny the declaration therein made that the law had been complied with. *Louisville, Etc., R. Co. vs. Letson*, 2 How. 539; *Mercer Co. vs. Hacket*, 1 Wall. 83; *Grand Chute vs. Winegar*, 15 Wall. 355; *San Antonio vs. Mehaffy*, 96 U. S. 314."

By an examination of the bonds and the mortgage in this case it will appear that their broad language under the principles announced in the above quotations fully estopped the bankrupt in this case from interposing the defense it is urging to defeat these bonds.

This court, in passing upon a similar statement of facts, and discussing the question of estoppel, in the case of *United States Savings & Loan Company vs. Convent of St. Rose*, 133 Fed. 354, said as follows:

"2. Conceding, for the purpose of this opinion, that the appellee was not authorized to become a shareholder in the stock of appellant for the purpose of securing a loan of money to enable it to build a convent on the land mortgaged, it does not necessarily follow that the court should set aside and annul the contract on that ground. The mortgage in this case was given under and in pursuance of the contract made between the parties. It was an executed contract. Appellant paid \$7,000 to appellee, and did everything which it agreed to do. Appellee has received the fruits and benefits of the contract, but has not paid all the money agreed to

be paid thereon by the terms of the written contract. Can it now successfully defeat the contract by the plea of *ultra vires*? \_It must be remembered that we are called upon to deal directly with the rule as applied to private corporations, where the contract has been fully executed by the party against whom the plea of *ultra vires* is invoked, as distinguished from the rule which is applied to cases of executory contracts or contracts made by public or quasi public corporations, which owe important duties to the public. The general rule applicable to the case in hand is expressed in 5 Thompson on Corporations, Sec. 6016, as follows:

“‘The great mass of judicial authority seems to be to the effect that where a private corporation has entered into a contract in excess of its granted powers, and has received the fruits or benefits of the contract, and an action is brought against it to enforce the obligation on its part, it is estopped from setting up the defense that it had no power to make it.’”

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### MOTION TO DISMISS.

The Washington Trust Company was in doubt whether the order of the court directing an immediate sale of the property for cash was a “proceeding in bankruptcy,” under Section 24b, or a “controversy arising in a bankruptcy proceeding,” under Section 24a. It, therefore, brought this cause here on Petition for Review, as well as appeal that the whole matter may properly come before the court and be decided upon the merits in one or both of the proceedings.

The respondent, Mr. Chavelle, has made a Motion to Dismiss the Petition for Review upon the grounds that an appeal is the proper proceed-



ing and the further ground that no certified copy of the record accompanied the petition for review.

It needs but a casual examination into the authorities to conclude that there is considerable confusion in the practice concerning the office of appeal and the office of a Petition for Review, and we understand the practice to be that where there is doubt, the litigate, to insure a full and complete review of all points involved in the controversy, may pursue an appeal and at the same time a petition for review, and that the Circuit Court of Appeals will consolidate them, consider both and determine the matters complained of in either or both proceedings, as the case may require. To this effect see:

Collier on Bankruptcy (8th ed), 434, 435, 436.

*Lockman vs. Lang et al.*, 132 Fed. 1.

*Fisher vs. Cushman et al.*, 103 Fed. 860.

*In re Worcester County Derby vs. Worcester Co.*, 102 Fed. 808.

In the last case above cited the court held, syllabus 3, a party who is in doubt as to his right to appeal from an order in bankruptcy, may, in addition to taking an appeal, file a Petition for Review under Section 24b of the Bankruptcy Act, and the Circuit Court of Appeals may determine the matters complained of in either or both proceedings as it shall determine to be appropriate. We believe the above is sufficient authority for the propriety of pursuing a petition for review and also an appeal.

Answering the other ground of the Motion to Dismiss, we call the court's attention to the fact that copies of the orders and proceedings sought to be reviewed were attached to the petition, and that authenticated copies followed later as a part of the record on appeal. The record is lengthy, at most, and the expense of taking this matter to the Circuit Court of Appeals is heavy, and it would have been idle and serve no good purpose to have doubled the record by having a certified copy filed with the Petition for Review, and later have it duplicated in connection with the appeal. We take it the statute does not require the certified copy to be filed the same moment as the petition for review. These matters are, to all intents and purposes, consolidated, argued together and will be determined together, and one record supplies the needs of the court and satisfies the provisions of the statute, so we feel that the motion to dismiss the petition for review should not be granted.

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#### THE SALE OF THE PROPERTY FOR CASH, FREE OF ENCUMBRANCE:

The specifications of error referring to the court confirming the order of sale and refusing the right of the mortgagee to foreclose are contained in Nos. 5, 6, 7, 8, 73, 75 and 76.

The propriety of the court confirming the order of the referee directing an immediate sale of the property for cash, free of encumbrances, is sought to be reviewed by appeal and by Petition



for Review, and this argument is made in support of the appeal as well as the Petition for Review.

The property in question consists of about nine acres of land located at Edmonds, Snohomish County, Washington, and certain machinery which was used in connection with the manufacture of bolts, and the building in which it was situated. The building and machinery have greatly deteriorated, and the evidence introduced upon the trial was predicated upon an area of 25 acres of tide lands when there was about three acres of tide lands.

If the bonds are held valid, as we believe they will be, there will be no equity whatsoever for the general creditors in this property, and the trustee in bankruptcy for creditors could have no interest therein, and in our judgment, has never had any interest in the property because the mortgage indebtedness has always far exceeded its fair market value. The bond holders are the only persons who will be injured by the sacrifice of this property, and the only persons who will be benefitted by its conservation or preservation, and the only way in which they can protect their investment and prevent a sacrifice of it at a forced sale is to be permitted to use their bonds in answering any bid which they might make. So we contend that until the validity of the bonds is determined no sale should be ordered of this property, and further, that when a sale is ordered that the bond holders or this trustee for the bond holders should be permitted to use their bonds in answering their bids.

The trust deed itself permitted and authorized the holders of the bonds to use their bonds at the foreclosure sale of this property. The provisions of the deed relating thereto are as follows:

“It is hereby further covenanted, agreed and declared that in case any sale shall be made of the said Washington Steel & Bolt Company’s factory or factories, wharf or wharves, plant or plants, property, rights and privileges, covered or intended to be covered by this indenture, or pursuant to or under a decree of judgment of a court of competent jurisdiction, the purchaser or purchasers at such sale shall after first paying in enough to cover the costs and expenses of the foreclosure suit and sale, and any unpaid compensation or charges of the trustee, and such other charges or expenses of the property pending the foreclosure as the court having jurisdiction of the suit, shall require to be paid in cash, shall have the right and shall be entitled in making settlement for, and in payment of the purchase money, to deliver to the trustee, or in case of a judicial sale to the person or persons legally appointed and qualified to receive the payment of such purchase money, any of the bonds or coupons secured by this indenture held by such purchaser or purchasers, and to use and apply the same in or towards the payment of such purchase money, reckoning and computing the said bonds and coupons at a sum equal to and not exceeding that which would be payable out of the net proceeds of such sale, if made for money to the purchaser or purchasers, as the holder or holders of the said bonds or coupons for his or their just share and proportion, in that character, of such net proceeds upon a due accounting, apportionment and distribution thereof.” (See Article V., Trust Deed, p. 304, Record.)

“It is hereby covenanted, agreed and declared that at any sale of the property, plant or plants,



rights or privileges hereby conveyed, whether made by virtue of any power herein granted, or by judicial authority, the trustee upon request of the holders of three-fourths in amount of the said bonds, then outstanding, may bid for and purchase or cause to be bid for and purchased, the same, for and on behalf of all the holders of the bonds hereby secured, and then outstanding, in the proportion of the respective interests of such bond holders, at a price not exceeding the whole amount of such outstanding bonds at the par value thereof, which the interest accrued thereon, and the expenses of such sale." (Article VII., Trust Deed, p. 306.)

The District Court heard the petition for review of the order directing a sale of the property at the same time that it heard the petition for review upon the other branches of the case, and passed upon both at the same time. The court held valid \$10,000 of the bonds so at the time the court confirmed the order directing sale of the property there were bonds established as valid, which were liens upon this property, and the court directed that these bonds be paid out of the proceeds of the sale. The Washington Trust Company was not bound under the terms of its trust deed to advance its own money for the purpose of securing a fair bid at the sale, and thereby protect its bond holders, and preventing the sacrifice of the property. The referee refused to permit the bond holders to use their bonds in the purchase of this property. The District Court, however, held some of the bonds valid, and we requested permission to use these bonds in bidding at the sale. This request was denied by the court, and in order to bring the matter fairly to the court's

attention and preserve our exception, we proposed the following provisions, which the court also denied:

These provisions are as follows, to-wit:

21. IT IS FURTHER ORDERED, CONSIDERED, ADJUDGED and DECREED that any holder or holders of the bonds or coupons secured by this mortgage, according to the terms of this decree, if successful as bidder or bidders at said sale, may, after first paying in enough to cover all proper and lawful charges and demands which may be made by the trustee, the Washington Trust Company, including its compensation and the compensation of its attorneys, and also paying in such portion of the expenses of this bankruptcy proceeding as should be paid by the holders of said bonds, use such bonds and coupons to apply toward the payment of the purchase money, reckoning and computing the said bonds and coupons at a sum equal to and not exceeding that which would be payable to such bond holder or holders as such out of the net proceeds of such sale if made for cash.

22. IT IS FURTHER ORDERED, ADJUDGED and DECREED that the Washington Trust Company may, as trustee for the holders of said bonds, with their consent, after first paying in money sufficient to cover such portion of the expenses of this bankruptcy proceeding as should be paid by the bond holders, become a bidder at said sale and may use, in making settlement for and in payment of the purchase money to account to the trustee in bankruptcy, any and all of the bonds or coupons secured by said mortgage and held valid by this decree, and may use and apply the same in and toward the payment of the purchase money reckoning and computing said bonds and coupons at a sum equal to and not exceeding that which would be payable out of the net proceeds of said sale, were the purchase price paid in cash, to the holders of such used bonds.



We charge as error the court's refusal to provide that the bond holders might in some way use their bonds in bidding at the sale.

The bond holders, whose bonds had been declared valid, were entitled, as a matter of right, to have the above provisions inserted in the decree, or have their right to use their bonds protected in some appropriate way. This rule is so well established that authority is not necessary. If they had not this right, very few bond holders or persons loaning money upon mortgages and notes could protect the investments which they had made, and to deny them this right would, in many cases, take from them for a nominal sum their investment. In view of the fact that the principle is so well established, we cite but few authorities in support of the contention:

*American Water Works Co. of Illinois vs. Farmers Loan & Trust Co.*, 73 Fed. 956.  
*Thompson vs. Prince*, 9 Wash. 107; 37 Pac. 291.

The court says, in commenting upon this point in *Thompson vs. Prince*, as follows:

“Counsel for appellant contends that the sheriff has a right to compel the actual payment of the money, but we cannot agree with him. There is no reason why the money should be paid over under such circumstances. Such a requirement would serve no good purpose, and might be productive of serious harm. It might not have been an easy matter for the plaintiff to have raised nearly \$60,000 to pay over to the sheriff, even though she was entitled to receive it back immediately, and the fail-

ure to raise it might have resulted in a sale for a much less sum, to the injury of either the plaintiff or the execution defendant, and perhaps, in a measure, to both of them. She had this money invested in this property in effect, and it was to satisfy the same that the sale was decreed."

Payment on foreclosure sale by surrender of bonds secured by the mortgage is regarded in law as payment in money.

*Moran ps. Hagerman*, 64 F. 499, 12 C. C. A. 239; 159 U. S. 261; 15 Sup. Ct. Rep. 1041.

In the case of *Ketchum vs. Duncan*, 96 U. S. 659; 124 L. Ed. 868, the court said:

"Permission to bond holders who are mortgagees to purchase at a sale of the mortgaged property and to pay by their bonds is not only usual, but it is highly advantageous to all persons who have an interest. It tends to enhance the price which may be obtained, and thus benefits other creditors as well as the mortgagor. That large bond holders have an advantage over small ones, in that they are required to pay less in money, may be true; but it is an advantage they purchased when they obtained their bonds, of which it would be inequitable to deprive them. Such an advantage is everywhere recognized and protected, notably in partition suits, and in sales of the assets of a partnership, as well as in many sheriff's sales."

It is to be observed in the present case that all of the bond holders who are represented by the trustee under the trust deed desire to use their bonds in bidding at the sale.

In the case of *Reed vs. Schmidt*, 115 Ky. 67; 72 S. W. 367; 61 L. R. A. 273, the court said:

"From the enormities of the properties involved, and of the sums necessary to buy them in



at decretal or foreclosure sales, the courts have favored combinations of those interested in the property as bond holders or stock holders, organized to buy in the properties, for the reason that by this means only are bidders assured, and the best interests of those having claims upon the property protected. *Terbell vs. Lee*, 40 Fed. 40; *Cary vs. Houston & T. C. R. Co.*, 45 Fed. 438; *Cook, Corp.*, Sec. 886 and authorities there cited."

The case of *Sage vs. Central R. R. Co.*, 99 U. S. 334; 25 L. Ed. 394, involved a foreclosure of a mortgage containing provisions to the effect that the trustee in case of a foreclosure could use the bonds in bidding in the property on behalf of the bond holders. We take the following from the decision of the court:

"The purposes sought to be accomplished by it are manifest:

"First. It was designed for protection against the perils of a forced sale for cash of an unsalable property. It was well known that at judicial sales of railroads for cash there is little likelihood of obtaining a bid for a sum at all commensurate with the value of the property sold, or with the amount of incumbrances upon it. The amount required is so large, usually, that it is beyond the reach of ordinary purchasers.

"The primary object of the deed was to secure to the bondholders a prior right to the entire property—the subject of the trust—so far as it was needed for the full payment of the bonds."

Also in the case of *Jacobs vs. Turpin*, 83 Ill. 423, it was held that where the purchaser is the holder of notes secured by a deed of trust no money need be paid in.

It is therefore the contention of the Washing-

ton Trust Company that the agreement in the deed of trust above referred to permitting the bond holders to use their bonds in payment of the purchase price at the sale should be upheld and the agreement of the parties enforced, as it is not in violation of any statute or law on the subject or contrary to public policy, and prejudices no one. It preserves the rights of the bond holders to their security and gives effect to the intention of the parties. To deprive them of this right would be to deprive them of a portion of the security which the Washington Steel & Bolt Company gave them when they purchased the bonds relying upon the agreements and stipulations therein contained. Such an arrangement in no way prejudices any of the general creditors, but on the contrary will enhance the value of the sale. If the bond holders or the trustee representing them should bid beyond the value of the bonds naturally they would be required to pay the difference in cash. If the bond holders were not permitted to use their bonds and the amount bid in was less than the value of the bonds the entire proceeds would necessarily go to the bond holders to be applied on account of their bonds.

So we contend that until the validity of the bonds has been finally established, as it was understood by the court an appeal would be taken, and the bond holders in position to protect their investment by using their bonds in bidding for the property, no sale should have been ordered. In no case



should a sale have been ordered without at the same time protecting the rights of those whose bonds had been declared valid, and permitting them to use their bonds in bidding at the sale and making good their bid.

We before quoted from the order of Judge Clinton W. Howard, District Judge, of March 13, 1913, in which he ordered that when the validity of the mortgage and bonds had been determined, the trustee in bankruptcy must elect whether he will administer upon the equity of redemption for the benefit of creditors or surrender the mortgage to the mortgagee for foreclosure. We contend that this became the rule of the case and that the District Judge, instead of ostensibly foreclosing the mortgage himself, that the trustee in bankruptcy should have been required to administer upon the equity of redemption or surrender the property. There is a substantial reason why this should be done as the trustee has persistently held on to this property against the will and wish of the mortgagee or the bond holder, and are in fact holding adversely to them, and must be said to hold the property for the benefit of the general creditors and the lien or the amount of the mortgage should not be impaired nor the security encumbered with expenses incident to such holding. It is easy to see how the trustee in bankruptcy might attempt to assert a claim for a large amount for the care and preservation of this property, and attempt to have the same established as prior to the said mortgage lien.

This appellant and petitioner, for the reasons set for in this brief, asks this court to adjudge the bonds held by the Bank of Montreal, C. F. Chapin and Thos. S. Burley valid obligations of the Washington Steel & Bolt Company, and that there is due thereon the face of the bonds, together with interest from the first day of March, 1911, and that each of the said bonds is secured by the said trust deed, and that the order of sale entered by the said referee and confirmed by the said District Judge be vacated and set aside, and that the Trustee in Bankruptcy, by the decree of this court, required to elect whether he will administer upon the equity of redemption of said property for the benefit of general creditors, or surrender the property, and the whole thereof, for foreclosure, and that this appellant and petitioner have such other and further relief as, in the judgment of the court, may seem meet and equitable.

DANSON, WILLIAMS & DANSON,  
JAMES B. MURPHY, and  
CARL KINCAID,

*Counsel for Appellant and Petitioner,  
The Washington Trust Co.*





In the United States  
Circuit Court of Appeals  
for the Ninth Circuit

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THE WASHINGTON TRUST COMPANY,  
*Petitioner and Appellee,*  
VS.

EDWARD H. CHAVELLE, as Trustee of the  
Estate of Washington Steel & Bolt Com-  
pany, a Corporation, Bankrupt,  
*Respondent and Appellant.*

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ANSWER BRIEF OF WASHINGTON TRUST  
COMPANY TO BRIEF OF TRUSTEE IN  
BANKRUPTCY ON CROSS APPEALS.

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*Counsel for Washington Trust Co.*

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Filed  
FEB 18 1915





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ANSWER BRIEF OF WASHINGTON TRUST  
COMPANY TO BRIEF OF TRUSTEE IN  
BANKRUPTCY ON CROSS APPEALS.

It is the contention of the Trustee in Bankruptcy, as appears in his brief filed herein:

1. That the issue of bonds to McPhaden and Pike at 90 cents on the dollar was an *ultra vires* act of the corporation in violation of the constitution and statutes of the State of Washington.

2. That the bonds in question are non-negotiable.

3. That the \$25,000 of bonds pledged with the Bank of Montreal as collateral to a pre-existing loan of \$20,000 was issued without authority from the Board of Trustees and without any considera-



tion and consequently their issuance was an *ultra vires* act of the corporation and the bonds are void.

4. That the petition for revision and supervision should be dismissed.

5. That an appeal does not lie from an order to sell the property clear and free of encumbrances, and hence the appeal from that order should be dismissed.

6. That a memorandum decision and order was entered on February 7, 1913 and March 3, 1913, by the District Court (pp. 25-28), permitting the trustee in bankruptcy to administer upon the equity of the mortgagor, or surrender the mortgaged property for foreclosure, and not having been appealed from, became the law of the case, and the act of the trustee in obtaining an order to sell free of incumbrances was an election to administer on the equity of the mortgagor.

7. That the petition to the District Court to review the order of the referee was not verified by the Washington Trust Company and that the petition for supervision and revision is not so verified and hence both should be dismissed.

Thus it will be seen that all the defenses raised by the trustee in bankruptcy are technical. There is no question of fraud involved in the case. There is no question that the money advanced as a loan by the bank was not received by the Washington Trust Co. and used by it in its corporate business, nor is there any question but that McPhaden and Pike actually paid into the company the sum of

\$33,390, for which they received \$37,100 of bonds in settlement. These facts are admitted by the trustee in bankruptcy in his brief. Nor is there any contention in his brief by the trustee in bankruptcy that the bonds issued to McPhaden and Pike were issued for a past consideration and that the issue on that account was *ultra vires*. We shall take up the contentions of the trustee in bankruptcy and answer them separately.

### ANSWER TO PARAGRAPH I.

Is the issue of bonds to McPhaden and Pike at 90 per cent of the par value in violation of the constitution and statutes of the State of Washington?

The trustee in bankruptcy cites Article VII, Section 6 of the Washington Constitution and Sec. 3697 of Rem. & Bal.'s Code, upon which he relies to sustain his contentions. Art. XII, Sec. 6 of the Washington Constitution corresponds to the following articles and sections of the constitutions of other states of the union:

Ala. XIV, 6; Ark. XII, 8; Cal. XII, 11; Colo. XIV, 9; Ill. XI, 13; Ky. 193; Pa. XVI, 7.

It must be borne in mind that the trustee in bankruptcy contends that the fictitious indebtedness or increase incurred by the Washington Steel & Bolt Company consists in issuing the bonds at a reduction of 10 per cent of their par value.

It is a well settled principle of corporate law that in the absence of restraining constitutional



provisions or statutes, private corporations have the same power to sell their bonds at less than their par value, which natural persons would have. This flows from the principle that in the absence of statutory provisions, corporations may resort to the same means for the purpose of raising the money to prosecute the objects of their creation, which would be permissible in the case of natural persons.

*Thompson Corporations* (First Ed.) Sec. 6058-6059.

*Toledo etc. v. Continental Trust Co.*, 95 Fed. 497, 36 C. C. A. 155.

The great weight of authority is to the effect that a constitutional prohibition against the issuing of stock or bonds, except for money or property actually received or labor done, and against the fictitious increase of stock or indebtedness, was intended to protect stockholders against spoliation and to guard the public from securities that were absolutely worthless, and does not indicate a purpose to make the validity of every issue of stock or bonds by a private corporation depend upon the enquiry whether the money, property, or labor actually received was of equal value in the market with the par value of stock or bonds so issued.

*Memphis & L. R. R. Co. v. Dow*, 120 U. S. 287; 7 Sup. Ct. Rep. 482.

*Clark v. Bever*, 139 U. S. 96, 11 Sup. Ct. Rep. 468, 35 L. Ed. 88.

*Handley v. Stutz*, 139 U. S. 417, 11 Sup. Ct. Rep. 530, 35 L. Ed. 227.

*Brown v. Duluth*, 53 Fed. 889.

*Toledo etc. v. Continental Trust Co.*, 95 Fed. 497, 36 C. C. A. 155.

*Firth Co. v. S. C. Loan & Trust Co.*, 122 Fed. 569, 59 C. C. A. 73.

*Lake St. L. R. Co. v. Ziegler*, 99 Fed. 144, 39 C. C. A. 431.

*Sioux City O. & W. R. Co. v. Manhattan Trust Co.*, 92 Fed. 428, 433, 34 C. C. A. 431.

*Toledo St. L. & K. B. C. Co. v. Continental Trust Co.*, 95 Fed. 497, 517, 36 C. C. A. 155.

*Grant et al. v. East & West R. Co. of Alabama*, 54 Fed. 569, 4 C. C. A. 511.

*Kemmerer v. St. Louis Blast Furnace Co.*, 212 Fed. 63 (8th Cir.).

*Stein v. Howard*, 65 Cal. 616, 4 Pac. 662.

*Underhill v. Santa Barbara Land Co.*, 93 Cal. 30, 28 Pac. 1049.

*Nelson v. Hubbard*, 96 Ala. 238; 11 So. 428, 17 L. R. A. 375.

*Jones "Coroporate Bonds"* (3d Ed.) Sec. 186.

In the case of *Stein v. Howard*, 65 Cal. 616, 4 Pac. 662, *supra*, it was held that an increase of capital stock, under a resolution authorizing the additional shares to be sold at 87½ cents on the dollar was not such a fictitious increase of the stock as was prohibited by a constitutional provision similar to that contained in the Washington constitution.

In the case of *Brown v. Duluth*, 53 Fed. 889, *supra*, complainants sought to obtain an injunction restraining a railroad corporation from issuing and selling bonds at 80 per cent of their par value. Under the terms of the sale the company was to receive \$1,600,000 cash for \$2,000,000 face value of



bonds and \$666,666.66 face value of common stock. We take the following from the decision:

“This statute (referring to the Minnesota statute) was enacted to prevent ‘watered stock’ so called, from being issued or imposed upon the market.

“The question presented in the argument on this branch of the case are: (1) Is such a contract forbidden by the statute *supra*? (2) Can the complainant bring a stockholders suit to prevent the corporation from carrying out the contract? This statute was not intended to prevent or interfere with the usual method of raising money to build railroads, or for any legitimate corporate purpose. It is not to be construed as obstructive to the extent of restricting and hampering corporations in their internal management, and embarrass them in procuring means to carry out the legitimate purpose of the corporation; and unless it appears that, under the guise of building its road, bonds and stock of the defendant company are to be issued and put upon the market fraudulently that do not and are not intended to represent money and property, this corporation is not prohibited from entering into a real transaction based upon a present consideration, and having reference to legitimate corporate purposes. *Beach Corp.*, p. 909, and authorities there cited. Such a transaction is not a scheme or device to evade the statutes.”

In the case of *Nelson v. Hubbard* (Ala.), 17 L. R. A. 375, *supra*, the court said:

“The constitutional provision, standing by itself, does not require that the amount of money, or the value of the labor or property for which stock or bonds are issued, shall correspond with the face value of the stock or bonds for which it is issued. It is the statute, (there being a statute in Alabama on the subject of stocks), reinforcing the constitutional provision, which requires such correspond-

ence in value in the case of subscriptions for stock. In the absence of such statutory provisions, the section of the constitution above quoted would be complied with, in the case of stock, which was not a fictitious increase, but was issued for money, labor done, or money or property actually received. In the case of bonds, there is not, as there is in the case of stock subscribed any statutory provision requiring the value of the consideration received by the corporation to correspond with the amount or nominal or face value of the bonds issued therefor. Such bonds are not issued in contravention of the provision contained in the first sentence of the above mentioned section of the constitution, if the issue does not effect a 'fictitious increase of indebtedness,' and if they can properly be regarded as issued 'for money, labor done, or money or property actually received.' *The constitutional provision in question operates to invalidate evidences of indebtedness when there is in fact no debt; to require every issue of stocks or bonds of private corporations to represent substantial values received by the corporations; to impose upon those charged with the disposition of corporate securities the duty to procure therefor a fair and reasonable equivalent in money, labor, or property actually contributed to the corporation. Courts of the highest authority, which have considered the effects of such provisions have not construed them, when not fortified by more stringent statutory requirements, as invalidating issues of stocks and bonds in exchange for money, property, or labor, upon such terms as the corporate authorities, in the fair exercise of their judgment and discretion, may deem proper, though the amount received therefor was less than the face value of the securities. (Italics are ours.)*

In the case of *Underhill v. Santa Barbara Land etc. Co.*, 93 Cal. 30, 28 Pac. 1049, it was held that an indebtedness of a corporation was not fictitious



within the meaning of Art. 12, Sec. 11 of the California constitution, which is similar to Art. 12, Sec. 6 of the Washington constitution, where the indebtedness consists of notes and mortgages issued by the corporation in consideration of money advanced to it, though but a part consideration for each note had been received at the time of the execution of the not provided the full consideration was later received and there was no fraud.

Also in the case of *McKee v. Title Ins. & Trust Co.*, 159 Cal. 206, 113 Pac. 140, (involving provisions of the California constitution similar to those of the State of Washington), the court said (Italics are ours) :

“The company has the lawful right, the same as any natural person, to sell its bonds for any price it can get, provided it acts in good faith, and mere inadequacy of price does not avoid them.

“There is *no rule of public policy* or law of this state *which forbids a corporation from discounting its notes or bonds. It is a common custom, and it has never been held unlawful.* The code provides that no corporation shall issue stock or bonds, ‘except for money, paid, labor done or property actually received,’ and that any ‘fictitious increase’ of stock or indebtedness is void. Civ. Code., Sec. 359. The same provision is in the constitution, Article 12, Sec. 11. This does not forbid the sale of bonds at a discount.”

In the case of *Memphis v. Dow*, 120 U. S. 287, 7 Sup. Ct. Rep. 482, which appears to be the leading case on the subject, the court, used the following language in interpreting similar provisions of the Arkansas constitution :

“But appellant disputes its liability upon the bonds given for the balance upon the theory that they were prohibited from issuing them by the eighth section of the twelfth article of the constitution of Arkansas, adopted in 1874. That section provides that ‘no private corporation shall issue stocks or bonds, except for money or property actually received, or labor done, and all fictitious increase of stock or indebtedness shall be void.’ In support of this view, our attention is called to the fact, admitted by the demurrer, that the full value of the property, rights and privileges conveyed to appellant did not exceed \$1,300,000, the amount at which the capital stock was fixed; and, consequently, it is argued, the \$2,600,000 of bonds were issued without any consideration received in money, property, or labor, and represented only a fictitious indebtedness. In other words, appellant’s vendors were fully compensated for their interests by taking to themselves its entire stock.

“We do not concur in this view of the case. It does not, we think, rest upon a sound interpretation of the state constitution. The prohibition against the issuing of stock or bonds, except for money or property actually received or labor done, is against spoliation, and to guard the public against securities that were absolutely worthless. One of the mischiefs sought to be remedied is the flooding of the market with stock and bonds that do not represent anything whatever of substantial value.

“Recurring to the language employed in the Arkansas constitution, we are of opinion that *it does not necessarily indicate a purpose to make the validity of every issue of stock or bonds by a private corporation depend upon the inquiry whether the money, property, or labor actually received therefor was of equal value in the market with the stock or bonds so issued.* There was, consequently, no fictitious increase by appellant of its stock or indebtedness. Under these circumstances, *it cannot*



*be fairly said that the bonds secured by the mortgage were issued without any consideration whatever actually received in property."* (Italics are ours.)

We desire particularly to call the attention of the court to the case of *Handley v. Stutz*, 139 U. S. 417, 11 Sup. Ct. Rep. 530, wherein an active corporation, for the purpose of paying its debts, and obtaining money to prosecute its business, issued bonds; but finding it impossible to negotiate them, it issued shares of capital stock in an amount equalling the par value of the bonds as an additional inducement to the purchase. While the facts in that case were not similar to the ones involved here, the principles of law discussed and laid down by the court are applicable to the case at bar. The court held that the transaction, although practically amounting to a bonus or gift of stock as an inducement to buy bonds, was a regular one and fell within the corporate powers of an active corporation pressed for funds for properly carrying on and continuing its corporate business. The transaction in that case netted the corporation less than the par value of the bonds negotiated. We take the following extracts from the decision of the court. (Italics are ours.):

"The case, then resolves itself into the question whether an active corporation, or, as it is called in same cases, a 'going concern,' finding its original capital impaired by loss or misfortune, may not, for the purpose of recuperating itself and providing new conditions for the successful prosecution of its business, issue new stock, put it upon the

market, and sell it for the best price that can be obtained. The question has never been directly raised before in this court, and we are not, consequently, embarrassed by any previous decisions on the point.

“To say that a corporation may not, under the circumstances above indicated, put its stock upon the market, and sell it to the highest bidder, is practically to declare that a corporation can never increase its capital by a sale of shares, if the original stock has fallen below par. The wholesome doctrine, so many times enforced by this court, that the capital stock of an insolvent corporation is a trust fund for the payment of its debts, rests upon the idea that the creditors have a right to rely upon the fact that the subscribers to such stock have put into the treasury of the corporation, in some form, the amount represented by it; but *it does not follow that every creditor has a right to trace each share of stock issued by such corporation, and inquire whether its holder, or the person of whom he purchased, has paid its par value for it.* It frequently happens that corporations, as well as individuals, find it necessary to increase their capital in order to raise money to prosecute their business successfully, and one of the most frequent methods resorted to is that of issuing new shares of stock and putting them upon the market for the best price that can be obtained; and, so long as the transaction is bona fide, and not a mere cover for ‘watering’ the stock, and the consideration obtained represents the actual value of such stock, the courts have shown no disposition to disturb it.

\* \* \* \* \*

“A case nearer in point is that of *Clark v. Bever*, ante, 468 (139 U. S. 96), (decided at the present term of this court). In this case, a railroad company, of which defendant’s intestate was president and stockholder, had a settlement with a construction company, of which defendant’s in-



testate was also a member, for work done in building the road. The railroad company, being unable to pay the claim of the construction company, delivered to it 3,500 shares of its stock at 20 cents on the dollar, and the same were accepted in full satisfaction of the debt.

\* \* \* \* \*

*“But we think that an active corporation may, for the purpose of paying its debts, and obtaining money for the successful prosecution of its business, issue its stock, and dispose of it for the best price that can be obtained. Stein v. Howard, 65 Cal. 616, 4 Pac. Rep. 662. As the company in this case found it impossible to negotiate its bonds at par without the stock, and as the stock was issued for the purpose of enhancing the value of the bonds, and was taken by the subscribers to the bonds at a price fairly representing the value of both stock and bonds, we think the transaction should be sustained, and that the defendants cannot be called upon to respond for the par value of such stock, as if they had subscribed to the original stock of the company.”* (Italics are ours).

The above case and the case of *Fogg v. Blair*, U. S., 11 Sup. Ct. Rep. 476, lay down the rule that what is an equivalent received by the corporation for an issue of its bonds or stocks defends primarily upon the actual market value of the bonds or stock at the time they are issued or negotiated. The presumption is, where there is no evidence to the contrary, that the transaction was regular, and that which was actually received was all that the bonds were worth at that particular time. In the case of a recently created corporation, as in the present case, with no other faith and credit behind it except its personal and real property, it could not be

expected that its bonds would sell for their par value. As the court points out in the *Firth Co. v. South Carolina*, 122 Fed. 569, 59 C. C. A. 73: "Naturally and necessarily the bonds of a manufacturing corporation, just entering business, whose success and credit are not yet established, cannot command a ready sale and cannot be sold except at a large discount. Hypothecation prevents the sacrifice of the bonds, and gives every opportunity to try the future. If this be successful, the bonds can be realized in money without loss. If unsuccessful, the loss will be not greater than such as would occur if the bonds were forced on the market." There is no evidence in the present case that the bonds were issued to McPhaden and Pike at less than the actual market value of the bonds, and it will be presumed that that which was actually paid for them represented their market value at that time.

We could go on and quote numerous other authorities to the same effect but we shall not uselessly consume the time of the court.

But even in the case of the issue of bonds by public and municipal corporations where the statutes expressly direct that such bonds shall not be disposed of at less than par, the weight of authority is to the effect that a general authority to dispose of bonds at not less than par carries with it the implied authority to employ reasonable and proper assistance and pay commissions, and other expenses of getting the bonds on the market, when in the judgment of the officers it is necessary to do so.



39 L. R. A. (N. S.), 248 and cases cited.

*Church v. Hadley* (Mo.), 145 S. W. 8, 240 Mo. 680.

We invite the court's attention to the case of *Church v. Hadley*, 145 S. W. 8, *supra*, which is an exhaustive treatise on the subject citing many authorities.

In *Armstrong v. Ft. Edward*, 159 N. Y. 315, 53 N. E. 1116, the court said, "Where there is an express grant of power to them it carries with it by necessary implication every other power needful and proper to the execution of the power expressly granted."

In the case of *N. Y. v. Sands*, 105 N. Y. 210, 11 N. E. 820, it was said that it was not necessary that the person to whom the commission was paid be a broker.

In *State v. West Duluth Land Co.*, 75 Minn. 456, 78 N. W. 115, it was held that where a commission of 10 per cent of the face value of the bonds was allowed out of the proceeds of the bonds the latter were not void.

In *Manitou v. First Nat. Bank*, 37 Colo. 344, 86 Pac. 75, it was held that a contract made with a broker providing for paying him a commission out of the proceeds of the sale was not *ultra vires*.

In the present case the resolution of the Board of Trustees of September 1, 1908, authorizing the execution of the trust deed, also authorized a settlement with McPhaden and Pike at 90 per cent of the par value of the bonds. This resolution is a part

and parcel of the trust deed. In fact, it is the authority for the execution of the mortgage, and as between McPhaden and Pike and the corporation they should be read together. By the resolution itself the issue of bonds to McPhaden and Pike did not fall within the prohibition of the last paragraph of the mortgage that no bonds should be disposed of at less than 5 per cent discount. Certainly if the intention of the parties had been otherwise, McPhaden, who executed the mortgage as president, and Pike, as secretary, would have seen to it that the provision read otherwise. Further, McPhaden received no salary as president of the corporation, and none of his expenses for disposing of these bonds were paid out of the corporate funds, (p. 183). As the trustee in bankruptcy points out in his brief, McPhaden owned nearly all of the stock of the corporation. Certainly where such is the case, and in view of the holdings of the Supreme Court of the United States that such provisions as are contained in the Washington constitution and statutes were enacted primarily for the benefit of the stockholders, we submit that all the contracts in the present case having been entered into at the instigation of McPhaden should be upheld.

The trustee in bankruptcy admits in his brief, (p. —), that the Washington constitution and statutes do not in express terms prohibit a corporation from issuing its stock at less than its face value and all of the Washington authorities cited by him (p. —) are in no way in point. All of



those cases involved suits by creditors or receivers of an insolvent corporation for unpaid subscriptions to the capital stock of the corporation, on the theory that such subscriptions constituted a trust fund to be reached in equity by the creditors. No such question is here involved. It is sufficient to call attention to the case of *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371, 14 Sup. Ct. Rep. 127, where the court in defining the relations between a corporation and its creditors goes on to say:

“ \* \* \* \* \* In other words,—and that is the idea which underlies all these expressions in reference to ‘trust’ in connection with the property of a corporation—the corporation is an entity distinct from its stockholders as from its creditors. Solvent, it holds its property as any individual holds his, free from the touch of a creditor who has acquired no lien; free also from touch of a stockholder, who, though equitably interested in, has no legal right to the property.”

The cases of *Jorguson v. Apex Gold Min. Co.*, 74 Wash. 243, 133 Pac. 465, and *Kom v. Cady Detective Agency*, 76 Wash. 549, 136 Pac. 1155, have no bearing on the issues involved in the present case. The bond in the *Jorguson case* was an ordinary indemnity bond and the court refused to sanction the contract between the parties, which on its face was against public policy and in direct violation of the Washington statute. The *Kom case* was a somewhat similar case.

In those cases a corporation attempted, in effect, to pay dividends before they were earned to certain stockholders, out of all proportion to the net

profits of the corporation, when the statute requires that dividends must be paid proportionately and out of the net profits. The facts in this case present no such question as was presented in those cases. A mere reference to the section and statute and the constitution quoted by the trustee in his brief will disclose that the provisions of the statute regulating stock of a corporation under which the above actions were prosecuted have no application to bonds of a corporation, and that the provisions regulating bonds and those regulating stock of corporations are entirely different.

We are not disputing with the trustee in bankruptcy over the definition of an *ultra vires* contract of a corporation as set forth in the *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 11 Sup. Ct. Rep. 478. In that case the corporation attempted to do something absolutely foreign to the purpose for which it was incorporated. In the case at bar the corporation did what it was authorized to do by the statute and articles of incorporation; that is, to issue and sell bonds. If, in no event, a private corporation could issue and sell bonds, and the issuing and selling of bonds was something entirely foreign and different from the objects of its creation, then the *Pullman Palace Car Co.* case might have some application. Further, by an examination of that opinion it will be seen that the *Pullman Palace Car Co.* was a railroad corporation and that it attempted to lease and demise to another corporation all of its railway cars, con-



tracts, patent rights, and personal property. A Pennsylvania statute positively prohibited such a corporation from transferring its property in such a manner. It was created to conduct, to carry on its business, not to sell it out, and the decision in the case of the *Pullman Palace Car Co.* was largely based upon the fact that the corporation was a *quasi* public corporation, and that it owed duties to the public which it could not escape in that manner and concedes that in the case of a private corporation its ruling would have been different. The court, in its opinion, concludes, "The plaintiff, therefore, was not an ordinary manufacturing corporation such as might, like a partnership or an individual, engage in manufacture, sell or lease all of its property to another corporation," and further along in the opinion the court says, "The plaintiff was not a strictly private, but a *quasi* public corporation; and it must be so treated as regards the validity of any attempt on its part to absolve itself from the performance of those duties to the public, the performance of which by the corporation itself was the remuneration that it was required by law to make to the public in return for the grant of its franchise. *Pickard v. Car Co.*, 117 U. S. 34, 6 Sup. Ct. Rep. 635; *Railroad Co. v. Winans*, 17 How. 30, 39; *Railroad Co. v. Lockwood*, 17 Wall. 357; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. Rep. 469."

The court also says in its opinion:

"There is strong ground, also, for holding that

the contract between the parties is void, because in unreasonable restraint of trade, and therefore contrary to public policy."

So it will be seen that the ruling in the *Pullman Palace Car Co. case* has no application to the case at bar. As they appear in the same volume as the *Pullman Palace Car Co. case*, we again invite the attention of the court, in this connection, to the cases of

*Clark v. Beaver*, 139 U. S. 96, 11 Sup. Ct. Rep. 468, 35 L. Ed. 88.

*Fogg v. Blair*, 139 U. S. 118, 11 Sup. Ct. Rep. 470, 35 L. Ed. 104.

*Supree vs. Watson*, 216 Fed. 488.

*Holt vs. Henley*, 232 U.S. 637.

*Bank of North America, vs. Penn. Motor Car Co.*, 83

same month. In fact, the *Pullman Palace Car Co. case* and the *Beaver case* and the *Blair case* were decided on the same day, and there is no conflict in the opinion between them. They announce separate and distinct principles applicable to separate and distinct state of facts.

But even if this were a proper case for the defense of *ultra vires*, it would not avail the trustee in bankruptcy.

The following cases declare that neither the corporation nor its creditors can, under like circumstances to those here existing and under similar provisions of the law, maintain such an attack on bonds irregularly issued, and that the provisions of such laws are for the protection of stockholders, only. *McKee v. Title Ins. & Trust Co.*, 159 Cal.



tracts, patent rights, and personal property. A Pennsylvania statute positively prohibited such a corporation from transferring its property in such a manner. It was created to conduct, to carry on its business, not to sell it out, and the decision in the case of the *Pullman Palace Car Co.* was largely based upon the fact that the corporation was a *quasi* public corporation, and that it owed duties to the public which it could not escape in that manner and concedes that in the case of a private corpora-

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engage in manufacture, sell or lease any of its property to another corporation," and further along in the opinion the court says, "The plaintiff was not a strictly private, but a *quasi* public corporation; and it must be so treated as regards the validity of any attempt on its part to absolve itself from the performance of those duties to the public, the performance of which by the corporation itself was the remuneration that it was required by law to make to the public in return for the grant of its franchise. *Pickard v. Car Co.*, 117 U. S. 34, 6 Sup. Ct. Rep. 635; *Railroad Co. v. Winans*, 17 How. 30, 39; *Railroad Co. v. Lockwood*, 17 Wall. 357; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. Rep. 469."

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*Fogg v. Blair*, 139 U. S. 118, 11 Sup. Ct. Rep. 476, 35 L. Ed. 104.

*Handley v. Stutz*, 139 U. S. 417, 11 Sup. Ct. Rep. 530, 35 L. Ed. 227.

All four of these cases were decided during the same month. In fact, the *Pullman Palace Car Co. case* and the *Beaver case* and the *Blair case* were decided on the same day, and there is no conflict in the opinion between them. They announce separate and distinct principles applicable to separate and distinct state of facts.

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206, 113 Pac. 140; *Anderson v. Bullock Co. Bank*, 122 Ala. 275, 25 South 523; *Bishop v. Kent*, 20 R. I. 685, 41 Atl. 257; *Rochester Bank v. Averell*, 96 N. Y. 475; *Paulding v. Chrome Steel Co.*, 94 N. Y. 334; *In re N. Y. Economical Pr. Co.*, 110 Fed. 519, 49 C. C. A. 133; *Hervey v. Ill. Midland Ry. Co.* (C. C.), 28 Fed. 174; *Manhattan Hdw. Co. v. Phalen*, 128 Pa. 110, 18 Atl. 428; *Wood v. Corry* (C. C.), 44 Fed. 150, 12 L. R. A. 168; *Nelson v. Hubbard*, 96 Ala. 252, 11 South 428, 17 L. R. A. 375; *Eastmen v. Parkinson*, 133 Wis. 375, 113 N. W. 649, 13 L. R. A. (N. S.) 921.

#### ANSWER TO PARAGRAPH II.

We have already treated of the negotiability of the bonds in our main brief on the subject and refer the court to our argument there made.

#### ANSWER TO PARAGRAPH III.

In paragraph III of his brief, the trustee in bankruptcy claims that the \$25,000 of bonds pledged to the bank as collateral was issued without any consideration and without authority from the board of trustees.

The trustee in bankruptcy does not specifically allege in just what the want of consideration consists, but we presume that he claims that the issuance of the bonds as security for the past indebtedness is an issue without consideration. We have already treated this subject in our brief in chief, citing many authorities holding that a past indebtedness is a sufficient consideration for an issue of bonds provided there is no fraud and the trans-

action is bona fide, but we shall add something further here.

In regard to this same subject, the Circuit Court of Appeals in the case of *First Savings & Trust Co. v. Waukesha Canning Co.*, 211 Fed. 927, (7th Cir.) said:

“ ‘But,’ says appellee, quoting the language of Judge Ross at the Circuit, ‘the money paid, labor done, or property actually received, must be paid, performed, or received, as the case may be on account of the issuance of the bonds; and any bonds issued contrary to this provision are of course illegally issued. The provision does not mean, and cannot be held to mean, that such bonds may be issued as collateral security for any sort of pre-existing indebtedness.’

“The language of the statute does not, in our view of it, justify the conclusion arrived at in the case just quoted. If it be that an increase of the interest of the corporation in its assets is equivalent to the acquirement of property to the amount of such increase, and it be further true that the agreement of the creditors to accept the bonds at a valuation of 75 per cent of their face upon their several claims results in the reduction of the unsecured indebtedness in a sum equal to 75 per cent of the face of the bonds, why does not the placing of the bonds as collateral result in the enhancing, to that extent, of the interest of the appellee in its property just as advantageously as though appellee had acquired that much more property and incurred the bonded debt, as well as its unsecured indebtedness? How can it then be said that the issue of bonds was not made for money or labor or property at its true money value actually received? The statute is not in its terms technical. It does not attempt to say how the money, labor, or property shall be procured. It is said in *Nelson v. Hubbard*, 96 Ala. 238, 11 South 428, 17 L. R. A. 375.



‘And we do not think that such pledge (to secure debts already contracted), if made without fraud, and solely for the bona fide purpose of satisfactorily securing the payment of corporate debts, can properly be regarded as effecting a fictitious increase of indebtedness, or as not issued for money, labor done, or money or property actually received.’

“This case is cited approvingly by the United States Circuit Court of Appeals for the Fourth Circuit in *Firth Co. v. S. C. Loan & Trust Co.*, 122 Fed. 575, 59 C. C. A. 73, and in *Illinois Trust & Savings Bank v. Pacific Ry. Co.*, 117 Cal. 332, 49 Pac. 197.

“The United States Circuit Court of Appeals for the Second Circuit held, in *Re Waterloo Organ Co.*, 134 Fed. 345, 346, 67 C. C. A. 327, where a bond issue was transferred to a bank to secure accrued and future indebtedness, that the transaction complied with the requirements of the New York statute which provides that:

‘No corporation shall issue either stock or bonds except for money, labor or property actually received for the use and lawful purposes of such corporation.’

“The court says in *Hoskins v. Seaside Ice Mfg. & Cold Storage Co.*, 68 N. J. Eq. 476, 59 Atl. 645:

‘Nor does the fact that some of these bonds were taken as collateral security for an existing debt make the holder any less a bona fide holder for value than if he was a purchaser for cash.’

In the present case it must be borne in mind

We invite the Court’s attention to all of the authorities cited in the above case.

The case of *Gould v. Railway Co.*, 52 Fed. 504, 680, cited approvingly in *Sutton Mfg. Co. v. Hutchinson*, 63 Fed. 504, 11 C. C. A. 320, was a case involving the validity, as against the creditors of a railroad corporation, of a deed of trust exe-

cuted as additional security to certain stockholders and directors who had previously advanced large sums to it and for the repayment of which the company had already pledged some of its mortgage bonds. The only difference between the *Gould case* and the present case being that in the present case the first bonds pledged to the Bank of Montreal were the individual property of two of the directors, whereas in the *Gould case* all of the bonds were the property of the corporation itself.

that the Washington Steel & Bolt Company was out nothing in the way of collateral or otherwise on the \$20,000 loan until it pledged the \$25,000 in bonds on March 20, 1911. The bonds which were originally put up with the bank as security on this were the individual bonds of McPhaden and Pike. On the same reasoning as advanced in the case above quoted from the Washington Steel & Bolt Company received therefor in value for the issue of these \$25,000 of bonds 80 cents on the dollar, and further prevented any action or steps by the bank towards enforcing the collection of the loan or foreclosure on the trust deed. It is immaterial that the loan was already partially secured by \$22,900 of bonds from McPhaden and Pike. The bank, when the interest was in default, very properly demanded further security.

#### ANSWER TO PARAGRAPH IV.

While the Washington Trust Company has appealed from the judgment of the District Court, both as to the disallowance of certain bonds and the



confirmation of the order directing a sale of the property, it has also sought a review of the order directing a sale of the property by petition and notice. It did so because of the confusion that seemed to exist among the different courts upon that point. While there is confusion on the point, we are of the opinion that the order directing a sale of the property is reviewable by appeal, in any event, and as well by a petition for review, and that either or both methods might be employed, for the following reasons:

1. That the proceedings involving the validity of the bonds and the petition for the sale of the property filed by the trustee in bankruptcy were, to all intents and purposes, and in legal effect, consolidated and tried as one controversy in the court below. It was stipulated that the same testimony should be used by the referee and also by the District Court in considering both matters. They were submitted together and considered together by the District Court, and passed upon at the same time, and as one matter, and became different branches of one and the same controversy.

2. That the Washington Trust Company was entitled to appeal under Section 24a of the bankruptcy law of July 1, 1898, Sec. 541, 30 Statutes 553 U. S., compiled statutes 1901, page 3431, which vests in the Circuit Court of Appeals appellate jurisdiction over all controversies arising in a bankruptcy proceedings over which those courts would have had jurisdiction if this controversy had arisen

in the Federal Court in other cases outside of proceedings in bankruptcy. The controversy raised by the petition of the trustee to sell free of encumbrances and the answer of the Washington Trust Company thereto and the evidence taken thereon clearly comes within the class of controversies appealable had the controversy arisen in the Federal Courts in a case outside of the proceedings in bankruptcy.

*Hewitt v. Berlin Machine Works*, 194 U. S. 296, 24 Sup. Ct. Rep. 690, 48 L. Ed. 986.

*Dodge v. Norlin*, 133 Fed. 363, 66 C. C. A. 425.

The court on page 367, in discussing this point, says. (Italics are ours) :

“By section 25a it granted to the Courts of Appeals additional jurisdiction which before the enactment of the bankrupt law they could not exercise, and provided a different time within which this jurisdiction might be invoked, to the end that the proceedings in bankruptcy might not be unduly delayed. But there is nothing in the provisions of section 25a which excludes, revokes, or diminishes the general appellate jurisdiction granted by the previous section over controversies within the jurisdiction of the Courts of Appeals before the bankruptcy law was passed. The extent of its effect is to grant some additional jurisdiction, and to restrict to 10 days the time within which the jurisdiction of the Court of Appeals may be invoked in the three classes of cases there specified.

“Nor is there anything in the grant by section 24b of the power to revise and superintend in matter of law the proceedings of the inferior courts of bankruptcy *which in any way affects or limits the general appellate jurisdiction* vested by the sections of the law which have been considered.”



3. We believe the appellate courts are coming more and more to regard the classifications made by Sections 25a and 25b as being accumulative and not exclusive.

*Thomas v. Woods*, 173 Fed. 585, 97 C. C. A. 535.

In this section the court says on page 587. (Italics are ours) :

“At the outset we are confronted with the question which has become a part of nearly every bankruptcy cause in an appellate court, namely: Should the review have been sought by appeal or petition? The confusion existing on this subject has been frequently confessed by the courts. In *re McMahon*, 147 Fed. 684, 77 C. C. A. 668; *Coder v. Arts*, 213 U. S. 223, 232, 29 Sup. Ct. 436, 53 L. Ed. 772. The classification of matters in bankruptcy as ‘proceedings in bankruptcy’ and ‘controversies arising in bankruptcy proceedings’ is vague and in actual application has bewildered the courts and the legal profession. It is quite manifest that, when the decision of a trial court in a ‘bankruptcy proceeding’ is brought under view in an appellate court, it presents a ‘controversy’, and of necessity this is also a ‘controversy arising in a bankruptcy proceeding’. The phrases, therefore, upon which this classification is based, are *tautological*.”

#### ANSWER TO PARAGRAPH V.

We are not aware that we are seeking by petition and notice a review of the court's decision touching the validity of the bonds. A review of this point is sought by appeal.

#### ANSWER TO PARAGRAPH VI.

The first contention in this sub-division of the

trustee's brief is that the petition for review was verified by the attorney of the Washington Trust Company and not by an officer or agent of the Washington Trust Company. The verification itself assigned as a reason for its being made by the attorney that the officers were without the County of King and no officer nearer than Spokane in said state, (See Sec. 281, Rem. & Bal.'s Code), and it can be truly said also that the attorney is the agent of his client for purposes connected with the litigation. Ten days only being allowed to file a petition for review from the referee to the District Court, it would be impossible to get the verification of corporations living at a long distance from the place of trial.

We also contend in this connection that a verification is not necessary. It is admitted in the brief that there is no statute or general order requiring a verification, and the only thing suggesting the propriety of one is the blank forms. The only office of verifications upon pleadings is to give credit to statements of fact and compel truthfulness in the statement of facts. It avails nothing to have a person verify pleadings which raise questions of law, or set forth the contentions of a litigant, and therefore a verification would naturally have no place in connection with a petition for review. We also contend that since the statute is silent, that forms cannot make that invalid which is valid according to the terms of the statute.



*West Company v. Lea*, 174 U. S. 590, 19  
Sup. Ct. 836.  
891.

In this connection, we will state that we have no complaint to make concerning the position taken by the trustee to the effect that the order of March 3, 1913, directing that the trustee either administer upon the equity of redemption or surrender the mortgaged property to the mortgagee for foreclosure. We believe, with counsel for the trustee in bankruptcy, that this became the law of the case, but we do contend that the selling of the entire property for cash and cutting off the rights of the mortgagee is not administering upon the equity of redemption for the benefit of general creditors. It is an attempt to administer upon the entire property. We contend that the proper construction of that order in connection with the sale of the property is that the trustee in bankruptcy might sell the equity of redemption; or in other words, sell the property subject to the mortgage for the benefit of general creditors. If the court intended that the trustee in bankruptcy should sell the entire property it would not have required him to "administer upon the equity of redemption" or "surrender the property to the mortgagee for foreclosure." The very purpose of requiring a trustee to administer upon the equity of redemption, or rather upon the property subject to the mortgage or surrender the property to the mortgagee for foreclosure was to enable the bond holders and the

mortgagee to protect themselves in the way most advantageous to themselves. If there is nothing in the property, above the mortgage, for the general creditors, the trustee in bankruptcy could have no interest in it, and ought not to cling to it simply for the purpose of incurring costs and expenses to the mortgagee and preventing it from freely protecting itself and the bond holders in the premises. If there is no equity in the property for general creditors it was the duty of the trustee in bankruptcy to abandon the property for foreclosure purposes, as directed in said order. In the case of *In re Uelner*, 193 Fed. 787, the court upon this point says:

“It is urged by petitioner that his contract stipulates for a sale without appraisement, and if the property is sold by the trustee it will have to bring three-fourths of an appraisement made in the bankruptcy proceedings; that it will be subject to the payment of fees of an auctioneer, of the trustee and referee in bankruptcy, and of appraisers appointed in the proceedings; that the cost of advertising the property will be at a higher rate, and the advertisement will occupy more space, than if sold by the sheriff; and that he would not have the right to bid in the property and offset his debt against the price, but would be compelled to pay the full amount over to the trustee and await a distribution in due course.

“It is well settled that the trustee is not required to administer property burdened with liens or mortgages, and he may abandon same to the secured creditor. In fact, it is his duty to do so whenever it is certain the general estate will derive no benefit from the sale of such property. In such contingency it was the practice under



former bankruptcy acts for mortgage creditors to foreclose in the Federal Courts, and the jurisdiction, regardless of citizenship, with special reference to Louisiana mortgages, was upheld by the Supreme Court in *Ex parte Christy*, 3 How 317, 11 L. Ed. 603, and *Nugent v. Boyd*, 3 How. 437, 11 L. Ed. 664. If the bonds in this case are held to be invalid, of course, the bond holders have no interest in the property, but if they are held valid, and the amount due on them exceeds the price which may be offered for the property, certainly no such sale should be confirmed and no sale should be made, and as argued in our brief in chief, until the validity of the bonds had been determined.

In order of Judge Howard of the lower court, which counsel argues became the law of this case (p. 26 to 29, inc.), expressly states:

“If the equity of redemption is of any value, it should be administered for the benefit of the general creditors at their expense, but if it is of no value, the trustee should not concern himself or incur any expense in connection therewith.”

And on page 27 of the record in the same memorandum decision Judge Howard says:

“If he (referring to the trustee in bankruptcy) elects to administer the equity of redemption he must do so at the expense of the general creditors and in such manner as not to unduly hamper or delay the mortgagee in the collection of its debt.”

From these quotations it is apparent what the court meant by the administration by the trustee in bankruptcy of the equity of redemption.

#### ANSWER TO PARAGRAPH VII.

The point is here charged that no evidence accompanied the petition for review, and therefore the court should not consider the testimony. An-

swering this contention, we urge that the appeal and the petition and notice are consolidated in this court, docketed under one number and here as a single cause, and the testimony is here in that cause, duly certified. It is admitted by counsel for the trustee in bankruptcy (Brief p. —), that this testimony was the testimony before the referee and court upon the petition for the sale of the property. It is properly here in support of the petition for review as well as the appeal. It certainly would have been a useless and extravagant expense to have had two records containing exactly the same material in a single matter.

Counsel for the trustee in bankruptcy argues that the order of the referee does not provide that the sale should be made for cash. It was so intended and construed by the referee and by the court and the parties in interest, and can have no other construction. The court refused to insert a clause permitting the bond holders to use their bonds in bidding, which will appear from the certificate of the judge at the close of the provisions proposed by the Washington Trust Company; (See Record p. 130). The order of the referee directing that the property be sold is as follows:

“And it is further ordered, adjudged and decreed that the said Edward H. Chavelle, as trustee, be and he is hereby authorized, directed and permitted to sell and dispose of said property in the mortgage more particularly mentioned and described, free of and from the lien thereof and that the proceeds arising from the sale of said property



be held by the said trustee subject to the lien of the said mortgage as if said property had not been sold, subject to the final order, judgment and decree of this court adjudicating the validity *bona fides* and extent of said mortgage."

The effect of this order is that it shall be for cash, otherwise the proceedings arising from the sale could not be held by the trustee awaiting further disposition. The court, in modifying the judgment rendered by the referee concerning the validity of the bonds, also recited in effect that the property was ordered sold for cash, (see Record p. 113). The value placed upon the property of the bankrupt is rather what it should be worth than what it would really sell for in the market and we believe that it is the sincere conviction of the trustee in bankruptcy, as well as the Washington Trust Company, that the property will not sell for enough to pay 25 cents on the dollar upon the par value of the bonds if they are held valid, and if the trustee in bankruptcy insists upon the values assigned to this property, then he should be required, if he sells it over the objection and protest of the mortgagee, to obtain a sufficient sum to pay the bonds in full and if he is unable to do that, within a reasonable time, he ought to be required to surrender the property to the bond holders to be foreclosed upon in their own way and not force them to a procedure which may prove burdensome and expensive. The trustee in bankruptcy has never had charge of this property, with either the consent or acquiescence of the

bond holders, or the Washington Trust Company, but has always held the same over their protest, and against their will and no expense should be charged against the bond holders in favor of the trustee for such holding and such action.

We urge also in support of the validity of the bonds held valid by the court, the principle of estoppel. We have discussed this principle, in its application to this case, in our brief on appeal, and shall not repeat our argument here, and will content ourselves with calling the court's attention to the fact that the general power of a private corporation in this state to execute bonds secured by trust deeds is not questioned and the only thing that is urged is the alleged irregularity of the issue of the bonds and that the argument of counsel for trustee in bankruptcy would apply only in cases where the corporation had no corporate power to issue bonds, and that the issuing of bonds such as the ones in question were entirely foreign to the powers conferred upon the corporation by statute or its articles of incorporation. The corporation having authority to issue bonds, the principle of estoppel is applicable.

*D'Esterre v. City of New York et al*, 104 Fed. 605, 44 C. C. A. 75.

*Miller v. Perris Irr. Dist. et al*, 99 Fed. 143-145.

*In Orleans v. Platt*, 99 U. S. 676, 25 L. Ed. 404.

*In McKee v. Title Ins. & Trust Co.*, 159 Cal. 206, 113 Pac. 140.



The last case has come to our attention since writing our brief on appeal, and it is so similar in facts to the case at bar that we quote from the opinion as follows:

“The assignee in insolvency represents the interests of the creditors only. He is not suing on behalf of the stockholders or in their interest, and, there being no fraud, he stands in the shoes of the corporation with regard to the bonds. The corporation has received the money obtained by means of the bonds and has applied it to the payment of its debts and completion of the hotel. The money has thus inured to the benefit of the corporation and its stockholders and of the general creditors also, since it has unquestionably given a substantial value to a structure which would otherwise be comparatively worthless. The corporation is therefore estopped to dispute the validity of the bonds and the creditors are likewise bound thereby. The real point of the objection is that the manner of issuing the bonds was so defective that the transaction was *ultra vires* and void, notwithstanding that the corporation received and holds the benefits thereof. In regard to a similar claim the New York Court of Appeals said: ‘That kind of plunder which holds onto the property, but pleads *ultra vires* against the obligation to pay for it, has no recognition or support in the laws of this state.’ *Seymore v. Association*, 144 N. Y. 333, 39 N. E. 365, 26 L. R. A. 859.”

We believe that because of the reasons set forth in this brief, that part of the judgment of the lower court holding certain bonds valid should be affirmed.

Respectfully submitted,

DANSON, WILLIAMS & DANSON,  
JAMES B. MURPHY,  
CARL KINCAID,

*Counsel for Washington Trust Co.*

United States  
Circuit Court of Appeals  
For the Ninth Circuit

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EDWARD H. CHAVELLE, as Trustee in Bankruptcy of WASHINGTON STEEL & BOLT COMPANY, a corporation, Bankrupt,  
Appellant,

VS.

THE WASHINGTON TRUST COMPANY, a Corporation,  
Appellee,  
and

THE WASHINGTON TRUST COMPANY, a Corporation,  
Appellant,

VS.

WASHINGTON STEEL & BOLT COMPANY, a Corporation, Bankrupt, and EDWARD H. CHAVELLE, as Trustee in Bankruptcy of WASHINGTON STEEL & BOLT COMPANY, a Corporation,  
Appellees,

In the Matter of WASHINGTON STEEL & BOLT COMPANY, a Corporation, Bankrupt.

---

Petition for Rehearing

J. W. RUSSELL,  
Attorney for Appellant and  
Appellee, Trustee in Bankruptcy,  
714 Lowman Building, Seattle, Washington.

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United States  
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Appellees,

In the Matter of WASHINGTON STEEL & BOLT COMPANY, a Corporation, Bankrupt.

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Petition for Rehearing

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To  
UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE NINTH CIRCUIT, and

To HON. WILLIAM B. GILBERT,  
HON. ERSKINE M. ROSS,  
HON. CHARLES E. WOLVERTON,  
*Judges of said court.*

The petition of Edward H. Chavelle respectfully shows that he is the trustee of Washington Steel & Bolt Company, the bankrupt herein, and that he has been such trustee since the 21st day of March, 1912.

That heretofore, and on the 16th day of October, 1914, two orders were made herein by the judge of the United States District Court for the Western District of Washington, Northern Division, viz: an order modifying an order of Hon. John P. Hoyt, Referee in Bankruptcy, of July 20, 1914, holding all of the bonds issued by the bankrupt null and void—the District Court modifying said order to the extent of holding \$10,000 of said bonds valid; and the other an order made by the same referee on the 28th day of July, 1914, directing a sale of the property of the bankrupt estate free and clear from the lien of the mortgage thereon.

That thereafter, and on the 26th day of October, 1914, your petitioner duly appealed from so much of said first mentioned order as held \$10,000



of said bonds valid, and The Washington Trust Company, the trustee under the mortgage given to secure said bonds, appealed from the balance of said order, and also appealed from the second mentioned order, and on the same day The Washington Trust Company petitioned for a revision of both said orders.

That all of said appeals and both of said revisions came on for hearing, as one cause, before this court on the 19th day of February, 1915, and all said appeals and revisions were heard on that day. That thereafter, and on the 4th day of October, 1915, this court filed an opinion herein in which it decided the appeals from the first mentioned order, *but did not decide the appeal, nor did it decide the revision, from the last mentioned of said orders—the order directing a sale free and clear.*

Your petitioner presents this, his petition for a rehearing, and respectfully petitions this Honorable Court to grant a rehearing herein upon the following grounds:

#### I.

That this Honorable Court erred in not deciding the appeal or the revision from the order directing a sale of the property free and clear from the lien of the mortgage thereon.

## II.

That this Honorable Court fell into grave error as to what was decided by the Supreme Court of the State of Washington in *Bright v. Offield* (81 Wash. 442; 143 Pac. 159), and, as a consequence thereof, fell into grave error in holding the bonds in question, or any of them, negotiable.

## III.

That, regardless of the decision of the Supreme Court of Washington in the *Bright* case, the bonds in question are non-negotiable, and this Honorable Court fell into grave error in holding them, or any of them, negotiable.

In writing the opinion of the court herein, Mr. Justice Ross, after quoting the provision in the bonds relative to the payment of taxes, etc. said:

“It is said that thereby the amount to become due on the bonds was rendered uncertain, and the decision of the Supreme Court of Washington, in the case of *Bright v. Offield*, 143 Pac. 159, is cited in support of the contention. The decision there made in respect to the promissory note there in question is correctly stated in the 4th subdivision of the syllabus to that case, which is as follows:

“ ‘A note, secured by a mortgage, provided that if the maker should allow the taxes or any other public rates and assessments on the mortgaged property to become delinquent, or should do any act whereby the value of the mortgaged property should be impaired, or in case any taxes or assessments should be levied against the holder of the note on



account thereof, then on the happening of any of such contingencies the whole amount secured should at once become due and payable, and the mortgagee might collect the debt and foreclose the mortgage and sell the mortgaged property, or so much thereof as should be necessary to satisfy the debts, interest, and costs and all taxes, public rates, or assessments that might be due thereon, etc. *Held*, that by necessary implication the maker was bound to pay any such taxes, the provision being analogous to one authorizing the holder of the note to declare it due at any time he deemed the debt insecure, and destroyed the note's negotiability.' ”

In the first place, Mr. Justice Ross was entirely wrong in saying that it is our contention that the provision under discussion rendered the amount to become *due* on the bonds uncertain. That is not our contention. Our contention is that thereby the amount to be *paid* by the maker of the bonds became uncertain. In none of the cases cited upon our brief upon this proposition was there any provision whereby the holder of the security received any additional sum, or where any additional sum became *due* by reason thereof, but all such decisions were based upon the fact that by reason of the provision *the maker might be compelled to pay* a greater or less sum than that primarily specified in the instrument, and that is our contention here.

In the second place, with all due deference to the opinion of Mr. Justice Ross, I am constrained to say that the syllabus in 143 Pac. *does not* correctly state the decision of the Supreme Court of

Washington in that regard. If the court will turn to the opinion in the *Bright* case (at page 447 of 81 Wash.—page 161 of 143 Pac.), it will find that the court quoted the provision there under discussion as follows:

“ ‘If the maker . . . shall allow the taxes or any other public rates and assessments on the mortgaged property . . . to become delinquent . . . or in case any taxes or assessments shall be levied against the holder . . . on account of this note, . . . then . . . the whole amount herein secured shall at once become due and payable, and the mortgagee, its legal representatives or assigns, may proceed at once to collect these notes and foreclose the mortgage,’ etc.”

It will be observed that this quotation, as used by the Supreme Court of Washington, leaves out entirely all reference to that part of the provision of the notes, there under discussion, providing for adding to the amount of the recovery the amount of any such unpaid taxes or assessments. Furthermore, in discussing the proposition, Mr. Justice Ellis did not place the decision upon that ground, but upon the ground that because there was an implied promise by the maker to pay such taxes that thereby the amount to be paid by the maker of the note became uncertain, and that, therefore, the note was made non-negotiable.

To prove the correctness of this assertion, I call the attention of the court to the fact that after quoting the provision of the note as above set forth, and



after holding that the provision therein accelerating the time of payment by non-payment of taxes, did not make the note non-negotiable, Mr. Justice Ellis continued:

“There is another phase of this condition of the note, however, which makes the undertaking uncertain in the amount to be paid in case of acceleration of maturity by such delinquency of taxes,  
\* \* \* The note, by its terms, is, in addition to a promise to pay a certain sum of money, a thinly veiled promise to pay the taxes on the mortgaged property, and not to allow taxes to be levied against the holder on account of the note. It is equivalent to a promise to pay these charges when due. So viewed, the instrument falls directly within the rule announced by the United States Circuit Court in *Farquhar v. Fidelity Insurance Co.*, 8 Fed. Cas., p. 1068, No. 4676, where it is said:

“‘Overlooking the clause touching attorney’s commissions, how can it be said that the notes are either unconditional or certain in amount, in view of the stipulation for the payment of taxes or charges in the nature thereof, assessed upon the principal or interest? Liable to taxation as the property and in the hands of the holder (and this is the import of the stipulation); in some places they would probably be free from this charge, while in others they may be subjected to indefinite and varying rates of taxation, so that the amount to be paid by the maker, either before or at the maturity of the notes, would fluctuate according to collateral circumstances, and be dependent upon the domicile of the holder. And of these contemplated charges, or additions to the nominal consideration, the notes themselves indicate no standard of measurement. They could only be ascertained by reference to extrinsic circumstances, and thus the amount to be paid by the maker is left indeterminate and subject to possible contention. Instruments whose consider-

ation is thus fluctuating and indefinite, and which are laden with such embarrassments to their circulation, could not perform the functions, and therefore do not possess the character of negotiable paper.' ”

In the opinion in the *Farquhar* case, and immediately preceding the part thereof quoted by Mr. Justice Ellis, the court stated the conditions in the notes there under discussion, as follows:

“The notes, which are the subject of this litigation, are objectionable on this ground. They are secured by mortgage, are for \$5,000 each, payable to bearer in ten years, with interest semi-annually, ‘together with an attorney’s commission of five per cent. for collection, in case suit be instituted hereon, and together with all taxes and charges in the nature thereof that may be levied upon this note or upon the indenture of mortgage accompanying the same, or the principal or interest moneys thereby secured, immediately upon their assessment.’ ”

Following the above quotation from the opinion in the *Bright* case, Mr. Justice Ellis cited the following cases as holding the same proposition, viz: *Howell v. Todd* (12 Fed. Cas., p. 707, No. 6783); *Walker v. Thompson* (108 Mich. 686, 66 N. W. 584); *Carmody v. Crane* (110 Mich. 508, 68 N. W. 268); and *Wistrand v. Parker* (7 Kan. App. 562, 52 Pac. 59).

In the *Howell* case, the court said:

“The second ground is that the amount to be paid is uncertain, for it provides for the payment, not only of interest which is certain, but also of taxes, the amount of which must necessarily be un-



certain until after they are assessed or imposed according to law. The instrument in question quite certainly is not a negotiable note.”

The note in suit in the *Walker* case was as follows:

“\$800.00. Paw Paw, Mich., Nov. 24th, A. D. 1892. Five years after date, for value received, I promise to pay to George E. Breck or bearer the principal sum of eight hundred dollars, with interest thereon at the rate of seven per cent. per annum, payable yearly, to-wit, on the 24th day of November in each year until due, and at the rate of seven per cent. per annum, paid annually after due, and to pay all taxes assessed against the real estate and the mortgagee’s interest therein, described in the mortgage given to secure this note, until it is paid. The several installments of interest aforesaid, for said period, are further evidenced by five interest notes or coupons, of even date herewith. The payment of this note is secured by mortgage, of even date herewith, on real estate described therein, in Keeler, Van Buren county, Michigan. No. one. Jasper L. Thompson.”

The court held that this note was non-negotiable.

In the *Carmody* case, the court said that the note in suit was “in form precisely like that considered in *Walker v. Thompson*”, and in deciding the case said:

“1. While it is true that the mortgagee’s interest in land was not, at the date of the making of the note in question, October 20, 1894, subject to assessment for taxation as such, yet the obligation under this note is not limited to such assessments as might in the future be made under existing laws,

but it covers as well assessments which might thereafter be authorized by legislation." The note was held to be non-negotiable.

The note in the *Wistrand* case contained the following provision:

"This note is secured by a mortgage on real estate. This note may become due and payable at once by reason of the failure to comply with the conditions of the accompanying mortgage, which is made a part hereof."

The mortgage provided "If the said party of the first part shall pay said notes, and the interest thereon when due, and shall pay all taxes and assessments levied against said premises before the same become delinquent, then this deed shall become void, and shall be released at the cost of the party of the first part. But should first party fail to pay said notes or interest, or any part thereof, when due, according to the tenor and effect of said notes, or fail to pay all taxes and assessments before the same become delinquent, then all said notes become immediately due and payable at the option of the party of the second part, or the legal holder of such notes, without notice, and shall draw interest at the rate of 12 per cent. per annum from the date of said note until fully paid."

It was held that the notes and the mortgage must be read together, and that, when so read, the notes were non-negotiable by reason of the provision in the mortgage for the payment by the maker of taxes, and that the note would, at the option of the holder, become immediately due and payable if such taxes were not paid as therein provided.

In view of what Mr. Justice Ellis said and quoted in the *Bright* case, and in view of the decisions of



the various courts in the cases cited by him, can this court longer doubt that that decision was based squarely upon the fact that the maker of the note there in question had agreed to pay taxes, if any, in addition to paying the sum for which the note was primarily given?

Following the citation of the above cases, Mr. Justice Ellis said:

“The instrument further provides that ‘if the maker . . . shall do any act whereby the value of said mortgaged property shall be impaired,’ the whole amount shall at once become due and payable, and the mortgagee may proceed to collect the notes and foreclose the mortgage. This would authorize the holder of the note to proceed to collect the note and foreclose the mortgage upon the doing of any one of an almost infinite variety of things, such as suffering or committing waste, suffering the buildings to burn down without replacing them, suffering a nuisance to be maintained upon the mortgaged or adjacent property, permitting undesirable tenants to occupy the premises, and many other things which might be suggested. It is, in effect, an undertaking to prevent these things, in addition to the payment of money. This provision is closely allied to a provision authorizing the holder of a note to declare it due at any time he may deem the debt insecure. Such provision usually, and we think soundly, is held to destroy the negotiability of the note. *First National Bank v. Bynum*, 84 N. C. 24, 37 Am. Rep. 604; *Smith v. Marland*, 59 Iowa 645, 13 N. W. 852; *Holliday State Bank v. Hoffman*, 85 Kan. 71, 116 Pac. 239, 35 L. R. A. (N.S.) 390.”

In each of the cases cited by Mr. Justice Ellis, as above quoted, there was a provision authorizing the holder of the note to collect it if he deemed him-

self insecure, although the time of payment, as fixed in the note, had not yet arrived.

Following the above quotation, Mr. Justice Ellis further said:

“This instrument is a contract in which the maker has undertaken to do many things beside the payment of a sum certain in money. It is not a negotiable promissory note. Rem. & Bal. Code, §3396 *supra*.”

In the opinion herein, Mr. Justice Ross, still discussing the *Bright* case, further says:

“It is manifest that the clause in the promissory note there involved and considered is wholly unlike the clause contained in the bonds here under consideration, which expressly declare that ‘all payments upon this bond, both of the principal and interest, shall be made without deduction for any tax or taxes that said Washington Steel & Bolt Company may be required to pay or to retain therefrom by any present or future laws of the United States of America, or of the State of Washington,’ and contains the further express covenant and agreement on the part of the obligor ‘to pay any and all such tax or taxes,’ in effect an express promise to pay both principal and interest of the bonds in full, *without any deduction* on account of any tax or taxes and an express covenant of the mortgagor to itself pay all such taxes.”

Was there any provision in the note in the *Bright* case whereby any *deduction was to be made* by reason of unpaid taxes, and didn't the maker of that note *expressly covenant to himself pay all such taxes?*

The bonds in this case, in addition to the pro-



vision quoted by Mr. Justice Ross, contained a recital that they were secured by a mortgages,

“covering and conveying all real property and personal property owned by the said Washington Steel & Bolt Company, and more particularly described in said mortgage, and to which reference is hereby made for the nature and extent of the security and the rights of the holders of these bonds, and the terms and conditions thereof, which is duly recorded in the office of the County Auditor of Snohomish County, State of Washington.” (See copy bond, p. 258 of Transcript of Record.)

It will be noted that not only do the bonds mention the mortgage, but they expressly refer the holder thereof to it, its terms and condition. Such reference made the terms, conditions and covenants of the mortgage a part and parcel of each of the bonds issued under it.

*Sill v. Pate*, 230 Ill. 39; 82 N. E. 356.

*Judy v. Warne*, 100 N. E. (Ind.) 483.

*Strong v. Jackson*, 123 Mass. 60; 25 Am. Rep. 19.

*Brown v. Tom*, 26 S. W. (Tex. Civ. App.) 299.

In each of the foregoing cases the suit was upon a promissory note, negotiable in form, and in each of them some reference was made to some other writing, viz: the *Sill* case recited that another note and a trust deed were deposited as collateral to it; the *Judy* case contained this statement, “Secured by mortgage”; the *Strong* case recited that it was

secured by mortgage; and the *Brown* case recited that the makers thereof had indorsed over, as security, a certain other note. In none of them was any reference made as to the conditions of the writing mentioned, nor was the holder referred to the writing itself. Notwithstanding that fact, however, in each case the court held that the holder of the note, although a holder for value and before maturity, took it subject to all the conditions contained in the writing referred to therein. The case at bar is much stronger than any of those above cited, for the reason that the bonds here under consideration expressly refer the holders thereof to the mortgage "for the nature and extent of the security and the rights of the holders of these bonds, and the terms and conditions thereof."

Assuming the law to be as laid down in the foregoing cases, and there are no decisions to the contrary, let us see what, if any, conditions were contained in the mortgage referred to in the bonds in suit, and which would make them, when construed with the mortgage, non-negotiable. A copy of that mortgage is contained in the Transcript of Record herein, is "Petitioner's Exhibit 39," and is to be found at pages 277-327.

Turning to pages 293-294 thereof, we find that the Washington Steel & Bolt Company covenanted, "that it will keep the buildings and other improvements on said premises in as good condition as the



same are now, and not permit or allow waste upon said premises, and will keep the same free and clear of all taxes, liens or incumbrances which might affect or impair the security of the bondholders, under this Indenture; and that at any time hereafter on demand of the Trustee, it will execute and deliver such further assurances and instruments of title by way of security as shall be necessary to correct any imperfection, which may now exist in the lien created by this Indenture, or to pass by way of security any other acquired title, or interest which the Washington Steel & Bolt Company may hereafter acquire in perfection or enhancement of its own present title, or any additional real or personal property, which may hereafter be acquired or constructed by the Washington Steel & Bolt Company, and that such further assurance and such conveyance of such other acquired property shall be for the purpose of affectuating and confirming the clause of this Indenture purporting to operate upon other acquired property, and in order to extend over the same the lien of this Indenture."

Proceeding to Article I thereof, and on pages 295-296, we find that the Washington Steel & Bolt Company,

"further covenants and agrees at all times diligently to preserve all the rights and privileges now possessed by it, and which may hereafter be granted to or conferred upon it, and at all times to do everything that may be necessary to preserve, maintain or renew its corporate existence and organization, and at all times to preserve and maintain the said Washington Steel & Bolt Company's property, plant or plants hereby conveyed or hereafter acquired and every part thereof, in good repair, working order and condition, and to supply all necessary machinery, tools, stock equipment, appliances and buildings and from time to time to make all needful and proper repairs, renewals, replacements, useful and

proper alterations, additions, betterments and improvements to the end that the value of the security under this Indenture shall never become lessened or impaired."

Article III thereof, pages 296-299 of record, provides that if default is made in any of the covenants contained in said mortgage the Trustee may take possession of the property and conduct the business, etc.

Article IV thereof, pages 299-301 of the record, provides that if default shall be made as to the payment of taxes, or as to any of the covenants or agreements contained in the mortgage, the Trustee may take possession of the property, sell the same, from the proceeds pay all taxes, etc., and apply the balance upon the bonds.

Article V thereof, pages 301-306 of the record, provides that if default shall be made in the interest, in the payment of taxes, or "in respect to any act, promise, stipulation, covenant or agreement herein contained," the Trustee may take and operate the property, as provided in Article III; sell it, as provided in Article IV; or proceed to foreclose the mortgage by suit, and that in the event of sale, either by the Trustee or through foreclosure, the taxes, charges, etc., are to be first paid, and that the balance of the money derived from the sale be distributed among the bondholders, etc.

Reading these covenants into the bonds, as we



have seen they must be read into them, we then have instruments which are, as Mr. Justice Ellis said about the note in the *Bright* case, “a contract in which the maker has undertaken to do many things beside the payment of a sum certain <sup>in</sup> ~~of~~ money.” Wherein is it possible to draw any distinction between the note in the *Bright* case and the bonds in this case? I submit that no distinction exists—not even in the provision providing for the payment of taxes out of the proceeds of the sale of the property, although, as hereinbefore pointed out, the Supreme Court of Washington did not base its decision in the *Bright* case upon that provision of the note there in question.

In writing the opinion of the court in this case, Mr. Justice Ross, after quoting from that provision of the bonds in this case whereby the Washington Steel & Bolt Company promises “to pay any and all such tax or taxes”; says that this is “in effect an express promise to pay both principal and interest of the bonds in full, *without any deduction* on account of any tax or taxes and an express covenant of the mortgagor to itself pay all such taxes.” It will be noted that Mr. Justice Ross emphasized the words “without any deduction” by underscoring them, thereby, evidently, basing his decision upon the fact that, because the amount of such taxes was not to be deducted from the amount due upon the

bonds, this case differed from the *Bright* case. Mr. Justice Ross, evidently, assumed that the decision in the *Bright* case was based upon the fact that the holder of the note there under discussion was empowered to take advantage of certain lapses of the maker of the note, and to do certain things in the event such lapses occurred. Such, however, was not the ground of the decision in the *Bright* case, but the note in that case was held to be non-negotiable because it was "a contract in which the maker has undertaken to do many things beside the payment of a sum certain in money." Has the maker of these bonds undertaken to do fewer things "beside the payment of a sum certain in money" than had the maker of the note in the *Bright* case?

The Negotiable Instrument Act of the State of Washington was passed in 1899, and both the note in the *Bright* case and the bonds in this case were issued under that act. A copy of so much of that act as is material to the question here discussed is set forth, at length, in the opinion in the *Bright* case, also in the brief of the Trustee in Bankruptcy herein (pages 40-42), and I beg to refer the court thereto, without repeating it here.

When the writer of this petition for a rehearing wrote the brief for the Trustee in Bankruptcy herein, he did not go so thoroughly into a discussion of the decision in the *Bright* case as he has now done



for the reason that, to his mind at least, the decision in that case and the opinion written by Mr. Justice Ellis therein, were so absolutely plain that no possible misunderstanding of what was decided there, or of the ground upon which that decision was based, could be had. He has now attempted to rectify the mistake he then made.

It is quite evident that Mr. Justice Ross considered C. F. Chapin, Meta McElroy, and Thomas Burley holders of bonds "in good faith and for value." Did he overlook the fact that at the time they purchased the bonds from McPhaden they were all stockholders in the Washington Steel & Bolt Company, and that as such they were chargeable with knowledge as to the conditions of the mortgage, and chargeable with knowledge as to how McPhaden acquired the bonds he transferred to them? Attention was specifically called to that fact in the brief for the Trustee in Bankruptcy, page 33, as follows:

"In the first place, Chapin, Mrs. McElroy, and Burley were all stockholders in the Washington Steel & Bolt Company at the time they bought their bonds. (See testimony of Burley, Record, p. 178; testimony of Chapin, Record, p. 216 ; and testimony of Mrs. McElroy, Record, p. 218). Being stockholders, they were bound to know the provisions of the trust deed."

What has heretofore been said in this petition has, as the court has already seen, been upon the

error claimed under II of the statement of errors herein, viz: misconstruction of what was decided by the Supreme Court of Washington in the *Bright* case. The error claimed under III of the statement of errors is, however, covered by the cases cited in the discussion under II of that statement inasmuch as they show the law to be that an instrument, otherwise negotiable, is made non-negotiable by the insertion therein of a promise by the maker to pay any taxes that may be levied upon the interest of the holder of the instrument, in addition to the payment of the sum primarily provided for in the instrument, and that, too, entirely irrespective of the decision in the *Bright* case.

Your petitioner begs leave to refer to, and make a part of this petition for a rehearing, his brief heretofore filed herein, as fully as if the same was incorporated at length herein, and asks to have the arguments therein considered as fully upon the decision of this petition as if it was so incorporated herein at length.

Wherefore, your petitioner prays that a rehearing be granted him herein, and he will ever pray.

EDWARD H. CHAVELLE,  
*Petitioner.*

J. W. RUSSELL,  
*Petitioner's Attorney.*



State of Washington, }  
County of King. } ss.

Edward H. Chavelle, being duly sworn, deposes and says that he is the petitioner in the foregoing petition named; that he has read the foregoing petition, knows the contents thereof, and believes the same to be true.

Subscribed and sworn to before me this 30th day of October, 1915.

EDWARD H. CHAVELLE,

B. T. WOODS, JR.

Notary Public in and for the State of Washington,  
residing at Seattle.

(L. S.)

State of Washington, }  
County of King. } ss.

I, Joel W. Russell, attorney for the petitioner above named, and counsel for him herein, do hereby certify that, in my judgment, said petition for a rehearing herein is well founded, and further certify that it is not interposed for delay.

J. W. RUSSELL.

